Supreme Court, U.S.
FILED

No. 10-521 OCT 15 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

BOARD OF COUNTY COMMISSIONERS
OF BOULDER COUNTY,

Petitioner,

v.

ROCKY MOUNTAIN CHRISTIAN CHURCH
and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID HUGHES, Deputy County Attorney
Counsel of Record
BOULDER COUNTY ATTORNEY
P.O. Box 471
Boulder, CO 80306
(303) 441-3190
dhughes@bouldercounty.org

JEAN E. DUBOFSKY
THE DUBOFSKY LAW FIRM, P.C.
1000 Rose Hill Dr.
Boulder, CO 80302
(303) 447-3510

JOHN R. BAUER
ROBINSON & COLE, LLP
One Boston Place
Boston, MA 02108
(617) 557-5900

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Equal Terms and Unreasonable Limitations provisions of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc(b)(1) and (b)(3)(B), expand the scope of legal protection granted to religious exercise beyond that established by the First Amendment and thus violate the Establishment Clause and Section 5 of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
A. RLUIPA's place in Congress' efforts to overturn *Smith*	3
B. The Church's Expansion Application	6
C. The District Court Litigation	7
D. The Tenth Circuit Decision	8
REASONS FOR GRANTING THE PETITION	11
I. This case presents federal statutory and constitutional issues critical to local governments	11
II. The circuits are divided over the Equal Terms and Unreasonable Limitations provisions of RLUIPA	17
A. The multi-circuit split over the meaning of the Equal Terms provision	17
B. The split between the Tenth Circuit and the Seventh Circuit regarding the Unreasonable Limitations provision	19

TABLE OF CONTENTS – Continued

Page

III. The Decision Below is Incorrect 20

A. The Tenth Circuit erred by adopting an interpretation of the Equal Terms provision that provides special rights for religious uses 20

B. The Tenth Circuit erred by determining an Unreasonable Limitations violation is essentially a fact intensive, general reasonableness review of land use actions that affect religious landowners in a jurisdiction 25

C. If the Tenth Circuit's interpretation of the Equal Terms and Unreasonable Limitations provisions is correct, then those provisions of RLUIPA are unconstitutional as applied 28

1. The Tenth Circuit's interpretations violate Section 5 of the Fourteenth Amendment 30

2. As applied, the Equal Terms and Unreasonable Limitations provisions are an improper accommodation of religion in violation of the Establishment Clause 31

CONCLUSION 32

TABLE OF CONTENTS – Continued

Page

APPENDIX

United States Court of Appeals for the Tenth Circuit Opinion, dated July 19, 2010 ..... App. 1

United States District Court for the District of Colorado, Order for Permanent Injunction, dated March 30, 2009 ..... App. 22

United States District Court for the District of Colorado, Order Denying Motion for Judgment as a Matter of Law, dated March 30, 2009 ..... App. 35

United States Court of Appeals for the Tenth Circuit, Order Granting Limited Panel Rehearing, dated July 19, 2010 ..... App. 95

TABLE OF AUTHORITIES

Page

CASES

Centro Familiar Christiano Buenas Nuevas v. City of Yuma, 615 F. Supp. 2d 980 (D. Ariz. 2009) 18, 19

Chapman v. U.S., 500 U.S. 453 (1991) 29

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 21, 22, 25

City of Boerne v. Flores, 521 U.S. 507 (1997) 4, 13

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 25, 26

Cutter v. Wilkinson, 544 U.S. 709 (2005) 4

Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872 (1990) 3, 31

Engquist v. Oregon Dept. of Ag., 553 U.S. 591 (2008) 21

Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994) 13

Kelo v. City of New London, 545 U.S. 469 (2005) 14

League of Residential Neighborhood Advocates v. City of Los Angeles, 498 F.3d 1052 (9th Cir. 2007) 13

Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007) 5, 18, 21

Lynch v. Donnelly, 465 U.S. 668 (1984) 32

TABLE OF AUTHORITIES – Continued

Page

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004).....5, 17, 21

Monell v. Dept. of Social Servs., 436 U.S. 658 (1978).....27, 28

Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295 (11th Cir. 2006).....17

River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367 (7th Cir. 2010).....5, 18

Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).....25, 26, 28

Snowden v. Hughes, 321 U.S. 1 (1944).....22

Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).....14

Sossamon v. Texas, 130 S. Ct. 3319 (2010).....4

Tennessee v. Lane, 541 U.S. 509 (2004).....30, 31

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).....13, 31

Vision Church v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006).....5, 19, 20, 28

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. 1.....1, 7, 11, 18

STATUTES

28 U.S.C. § 1254.....1

42 U.S.C. § 1983.....15

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 2000bb 3, 4, 13

42 U.S.C. § 2000cc 2, 12

42 U.S.C. § 2000cc(a)(1).....26

42 U.S.C. § 2000cc(b)(1).....1, 20

42 U.S.C. § 2000cc(b)(3).....26

42 U.S.C. § 2000cc(b)(3)(B).....2, 25

OTHER AUTHORITIES

146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) 4

Anthony Minervini, Comment, *Freedom from Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial*, 158 U. Pa. L. Rev. 571 (Jan. 2010) 17

H.R. Rep. 106-219 at 29 (1999) 25

Marci A. Hamilton, *Federalism and the Public Good: The True Story behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311 (2003) 30

Matthias Kleinsasser, *RLUIPA's Equal Terms Provision and the Split Between the Eleventh and Third Circuits*, 29 Rev. Litig. 163 (2009) 17

Misha C. Jacob-Warren, *A Circuit Split: An Interpretation of the Equal Terms Provision of the Religious Land Use and Institutionalized Persons Act*, 34 Seton Hall Legis. J. 57 (2009) 17

OPINIONS BELOW

The Tenth Circuit Court of Appeals' opinion on rehearing is reported at 613 F.3d 1229 and is included in the attached Appendix at App. 1-20. The opinions of the district court (App. 22-40) are reported at 612 F. Supp. 2d 1157 and 612 F. Supp. 2d 1163.

JURISDICTION

The court of appeals' judgment was entered on July 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions Involved

U.S. CONST. amend. 1

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;. . . ."

Statutory Provisions Involved

42 U.S.C. § 2000cc(b)(1)

The Equal Terms provision of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(b)(1) states: "No government shall impose or

implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."

42 U.S.C. § 2000cc(b)(3)(B)

The Unreasonable Limitations provision of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(b)(3)(B) states: "No government shall impose or implement a land use regulation that – . . . (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

STATEMENT

Before Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"), courts resolved church/state land use disputes using long-standing, commonly understood legal criteria that deferred to local government decision-making in the absence of discrimination. Public officials, exercising guided discretion in reaching a decision on a zoning application, were generally subject to constitutional challenge only if they had no rational basis for the decision. Under RLUIPA, local governments may be required to approve applications from religious institutions that do not meet local government standards, even when the standards are constitutional.

In this case, a jury determined that Boulder County's partial denial of a special use application by Rocky Mountain Christian Church (the "Church") was not unconstitutional or motivated by religious discrimination. Nonetheless, the jury determined that Boulder County violated three provisions of RLUIPA. As it did with RLUIPA's predecessor, this Court should restore the balance between appropriate accommodation of religious interests and traditional deference to local self-determination by either (1) construing the Equal Terms and Unreasonable Limitations provisions of RLUIPA as merely codifying established Free Exercise jurisprudence, or (2) declaring those provisions unconstitutional because they exceed Congress' enforcement power or violate the Establishment Clause.

A. RLUIPA's place in Congress' efforts to overturn *Smith*

RLUIPA reflects an ongoing tension between Congress and the Supreme Court over the scrutiny courts give to laws that affect religious conduct. In *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872, 878-82 (1990), this Court – refusing to apply strict scrutiny – held that the Free Exercise Clause did not bar Oregon from applying its blanket ban on peyote possession to sacramental peyote use. Congress responded by enacting the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, which mandated strict scrutiny of neutral, generally applicable laws that

burden religious conduct. RFRA prohibited the government from substantially burdening a person's exercise of religion unless the government could demonstrate that the burden was the least restrictive means of furthering a compelling governmental interest. This Court invalidated RFRA as applied to states and their subdivisions, holding that RFRA exceeded Congress' remedial powers under Section 5 of the Fourteenth Amendment and violated the separation of powers. *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997).

Congress enacted RLUIPA in 2000. RLUIPA replicated the strict scrutiny in RFRA but limited it to state and local laws governing land use and institutionalized persons. In addition, it included the Equal Terms and Unreasonable Limitations provisions, which were intended to reflect settled constitutional principles. *See* 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady). This Court has examined RLUIPA only once, in the context of institutionalized persons. *See Cutter v. Wilkinson*, 544 U.S. 709 (2005) (holding that a provision of RLUIPA that limits the government's imposition of substantial religious burdens on persons confined to an institution does not, on its face, violate the Establishment Clause). In addition, this Court has scheduled argument on whether an individual may sue a state for damages under RLUIPA. *Sossamon v. Texas*, 130 S. Ct. 3319 (2010). The Supreme Court has not addressed the interpretation or constitutionality of RLUIPA's land use provisions.

The circuit courts have split regarding the appropriate interpretation of the Equal Terms provision of RLUIPA. The Eleventh Circuit requires governments to treat churches as well as they treat secular assemblies unless the difference in treatment passes strict scrutiny. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230-32 (11th Cir. 2004). The Third Circuit determined that local governments may not treat religious assemblies less well than secular assemblies that are similarly situated as to the regulatory purpose. *See Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266-68 (3d Cir. 2007). The Seventh Circuit adopted a slightly different version of the Third Circuit's test. *See River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 370 (7th Cir. 2010) (en banc). And, in this case, the Tenth Circuit found a RLUIPA violation occurs where a religious use is treated less well than a similarly situated secular use. Appendix ("App.") at 11-15. The circuits also disagree regarding what constitutes an "unreasonable limitation" under RLUIPA. *Compare* App. 15-17 to *Vision Church v. Village of Long Grove*, 468 F.3d 975, 990-91 (7th Cir. 2006).

These circuit splits have resulted in uncertainty among local governments about how RLUIPA should be interpreted and applied, divergent outcomes among the circuits, and lingering questions about the constitutionality of the Equal Terms and Unreasonable Limitations provisions.

B. The Church's Expansion Application

Beginning in 1978, Boulder County adopted zoning policies and regulations intended to preserve its scenic rural character. Court of Appeals Appellant's Appendix ("A.") at 4579-81; 4893-95. Boulder County encouraged agriculture and open space while requiring intensive, urban-type development to locate in or near cities. *Id.* As result, the county avoided urban sprawl, A. 4638:3-21; 4570-77; 4893-94, and many consider Boulder County's land use planning a national model. A. 4571:2-5.

Among Boulder County's regulatory provisions is special use review, a planning process commonly used nationwide. It requires local elected officials – in this case three county commissioners – to apply legislatively-adopted criteria to certain land use proposals through a public hearing process. Between Boulder County's implementation of special use review in 1994 and 2006, it conditionally approved all forty-five special use applications from religious institutions, A. 4099:8-23, including five special use applications from the Church. A. 6461-62. In contrast, Boulder County denied applications for a variety of other projects, ranging from golf courses to ATV rental stores. A. 4095:1-16. In 2004, the Church filed an application to nearly double the size of its 113,200 square foot worship and education complex, A. 3411:7-15, 4694:5-11, 6459-60, and to increase the number of parking spaces from 780 to 1375. A. 4077:8-11, 4694:5-11. If approved, the church complex would be Boulder County's largest building. A. 4076:11-20, 3788.

Boulder County completed its review, applied its regulations, concluded that a substantial portion of the expansion did not comply with its regulations, and denied the majority of the application. A. 5706-15, 5105:17-20.

After Boulder County's decision, the Church continued to hold worship services for more than 2300 members. A. 3428:1-3. It continued to operate a kindergarten through eighth grade Christian school. A. 3436:9-24. And it launched a second multi-million dollar church facility only twelve miles away. A. 3477:15-19, 3641:7-11. Even so, the Church filed suit against Boulder County.

C. The District Court Litigation

The Church alleged that the special use decision violated RLUIPA and the First Amendment. For its Equal Terms claim, the Church's primary contention was that it had been treated less favorably than Dawson School, a private non-religious school that received a special use permit to expand ten years earlier. App. 11-12. For its Unreasonable Limitations claim, the Church relied primarily on its expert witness, who testified that it had become difficult for churches and other large uses to locate in Boulder County. *See* App. 16; A. 3205.

The district court found that Boulder County's special use regulations were, on their face, neutral and generally applicable, A. 2530, but permitted a jury to decide the Church's as-applied claims. The

jury found that Boulder County did not discriminate against the Church based on religion, viewpoint, or association but nonetheless found that the County violated RLUIPA's Substantial Burden, Equal Terms, and Unreasonable Limitations provisions. A. 3107-3111. Based on these verdicts, the district court issued an injunction requiring the county commissioners to approve the special use application and ordered that Boulder County pay more than $1.2 million in attorneys' fees. A. 3336-38.

D. The Tenth Circuit Decision

Boulder County argued that the district court erred by not granting Boulder County's Fed. R. Civ. P. 50(b) motion for judgment as a matter of law. Specifically, Boulder County argued that if the district court had correctly construed RLUIPA's Substantial Burden, Equal Terms, and Unreasonable Limitations provisions, then it would have concluded that the evidence at trial was insufficient as a matter of law to demonstrate violations of those provisions. Boulder County further contended that courts should interpret RLUIPA as merely codifying free exercise principles, and if courts construe RLUIPA as expanding the scope of protection of religious exercise beyond First Amendment protections, then it is unconstitutional as applied because it violates the Establishment Clause and exceeds Congress' authority under Section 5 of the Fourteenth Amendment.

The Tenth Circuit ruled in favor of the Church, deciding that the district court's jury instructions properly formulated RLUIPA's Equal Terms and Unreasonable Limitations provisions. App. 11, 15.

The district court instructed the jury that to prove an Equal Terms claim, the Church must establish "that [Boulder County] treated [the Church] less favorably in processing, determining, and deciding the 2004 special use application of the [Church] than [Boulder County] treated a similarly situated nonreligious assembly or institution." A. 3084. Based on this definition, the Tenth Circuit concluded that the Church presented sufficient evidence that Dawson School was similarly situated to the Church and Boulder County treated Dawson School more favorably than it treated the Church. App. 12-14. The circuit court recognized that there were differences between the two applications, e.g, the school's application was half the size of the Church's application, the school proposed multiple small buildings while the Church proposed larger structures, and the school generated a smaller amount of traffic. *Id.* Even so, the Tenth Circuit found that similarities between the two applications, including the total square footage (the school at 196,000 v. the Church at 240,800), the size of proposed gymnasiums, and similarly-sized land buffers, were sufficient to support the Equal Terms verdict. *Id.*

The Tenth Circuit refused to apply a rational basis test to Boulder County's decision. It recognized that other circuits "disagree" about whether Congress

intended to codify Free Exercise Clause jurisprudence in enacting RLUIPA. However, it found that the rational basis test would not apply in any event because Boulder County's facially neutral land use regulations were "non-neutral" as applied. App. 13-14.

The Tenth Circuit took a similar approach to the Church's Unreasonable Limitations claim, once again concluding that the district court's jury instructions correctly construed the provision. App. 15. The instruction required the Church to prove that Boulder County's "regulation, as applied or implemented, has the effect of depriving both [the Church] and other religious institutions or assemblies of reasonable opportunities to practice their religion, including the use and construction of structures, within Boulder County." A. 3090. The Tenth Circuit acknowledged that Boulder County approved all prior special use applications by churches. App. 16. Nonetheless, it pointed to expert opinion testimony that Boulder County's land use regulations effectively left few sites for church construction and concluded that the evidence at trial was sufficient to find that Boulder County violated the Unreasonable Limitations provision. *Id.*

The Tenth Circuit did not address the Substantial Burden provision, finding that the Equal Terms and Unreasonable Limitations verdicts were sufficient to uphold the district court's injunction. App. 18. The circuit court concluded that Boulder County had not adequately briefed the constitutionality of the Equal Terms and Unreasonable Limitations provisions.

App. 18-19. For this reason, the Tenth Circuit adopted interpretations of RLUIPA that expand established free exercise principles without delving into the question of whether such an expansion is constitutionally permissible.

REASONS FOR GRANTING THE PETITION

Without guidance from this Court, lower courts and local governments have struggled to discern how RLUIPA applies to zoning regulations and decisions that affect religious uses. In cases where free exercise protections and RLUIPA overlap, any difference between RLUIPA and established free exercise standards is academic. In this case, however, the jury concluded that Boulder County's special use decision violated RLUIPA even though it did not violate the First Amendment. As a result, this case presents an important opportunity to (1) restore needed clarity regarding federal statutory and constitutional issues critical to the basic functioning of local government, and (2) resolve splits in the circuits regarding the meaning of the Equal Terms and the Unreasonable Limitations provisions.

I. This case presents federal statutory and constitutional issues critical to local governments.

The issues raised by this case go far beyond a dispute between a single church and a small

government entity. They are national issues of pressing importance, as demonstrated by the twenty-seven governmental and religious parties that signed amicus briefs below, including prominent national organizations such as the National League of Cities, the International Municipal Lawyers Association, the American Planning Association, the American Jewish Congress, and the National Council of Churches. This widespread interest results from RLUIPA's impact on land use planning, a core function of local government. Every day, local elected officials must make land use decisions ranging from legislative determinations about what uses may be permitted in a particular zone to quasi-judicial evaluations of the appropriateness of a use within a neighborhood. Thus, it is important for all local governments to have a clear understanding of how RLUIPA will be applied throughout the country.

Unfortunately, understanding and applying RLUIPA is not simple. The statute lacks specific definitions for its key terms,[1] and, as discussed *supra*, circuit court judges cannot agree on RLUIPA's meaning. The objections to a religious use are the same as those that arise from any kind of development, religious or secular: traffic generation, avoiding urban sprawl, and compatibility with the surrounding area. If local governments do not apply their

---

[1] Specifically, RLUIPA does not define "substantial burden," "treats," "equal terms," or "unreasonably limits." *See* 42 U.S.C. § 2000cc.

regulations to religious landowners because of RLUIPA, they may face lawsuits from the religious landowners' neighbors, who count on zoning laws to preserve the character of their communities. This possible outcome was demonstrated by *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1058 (9th Cir. 2007), in which the Ninth Circuit held that a city cannot "disregard its local ordinances in the name of RLUIPA." Although a local government may override its zoning law to rectify a violation of federal law, the Ninth Circuit held that a "potential violation" of federal law is not enough to override local law. Further, if local governments change their regulations to exempt religious uses from the same regulations with which secular landowners must conform, local governments may need to defend an Establishment Clause challenge. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

Finally, given this Court's decision to overturn RFRA, RLUIPA's predecessor, local governments must consider whether RLUIPA is a constitutional use of congressional power. *See Boerne*, 521 U.S. at 532-36; *see also infra* Section III(C). Although RLUIPA has a narrower application than RFRA, Congress' decision to focus on land use decisions is questionable. Congress enacted RLUIPA against a legal backdrop in which land use regulation is "a function traditionally performed by local governments," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). This Court's jurisprudence "has recognized that the needs of society have varied between different parts of the

Nation, just as they have evolved over time in response to changed circumstances." *Kelo v. City of New London*, 545 U.S. 469, 482 (2005). As a result, Supreme Court cases establish "a strong theme of federalism, emphasizing the 'great respect' that [the Court] owe[s] to state legislatures and state courts in discerning local public needs." *Id.* RLUIPA defies this long-standing deference to local self-determination of land use priorities by removing discretion from local land use officials when a religious institution seeks an exception to a zoning law. *See, e.g., Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

This case demonstrates the dilemma presented to local officials that arises from the disagreement and confusion over RLUIPA's meaning and constitutionality. For the Church's expansion proposal, Boulder County heard testimony in support of the application from Church members and in opposition from the community. A. 4090:2-17. One survey showed that three out of four local residents opposed the expansion. A. 6810. Approximately 450 people signed a petition in opposition. A. 4784:1-6. The Planning Commission unanimously recommended denial. A. 5467. The evidence presented to the commissioners showed that the majority of the Church's application did not meet Boulder County's special use regulations because the Church's high-impact development would constitute an urban use in an agricultural buffer and would be incompatible with

the surrounding low-density community. A. 4092:1-12, 5101-03, 5578-84.

During the public hearings, Boulder County was mindful of RLUIPA's requirements. *See* A. 5034-35. The county commissioners solicited information from the Church about how its proposed expansion related to its ability to practice its religion. A. 5021:10-14, 5071-77, 5093. The county commissioners concluded that denying in part the Church's expansion request would not violate RLUIPA because (1) the Church was developing an additional church site within the Church's catchment area; (2) the Church was serving the needs of its congregation; and (3) the Church had enough opportunity within its existing building to address space concerns by taking steps such as reconfiguring its space, adding worship services, or seeking additional locations for its activities. A. 5097-98.

According to the jury, Boulder County's good faith, non-discriminatory application of its neutral and generally applicable regulations was enough to avoid liability under 42 U.S.C. § 1983 but not RLUIPA. The district court dismissed several of the Church's claims based on its finding that Boulder County's land use regulations were neutral and generally applicable. A. 2529-30; *see also* A. 5234, 5239. The jury specifically found that Boulder County did not discriminate against the Church or otherwise violate the state or federal constitutions. A. 3108-3111. Nonetheless, the Tenth Circuit affirmed the jury's holding that Boulder County violated at least

two provisions of RLUIPA, with minimal discussion of Free Exercise standards. App. 13-15.

Neither the district court nor the Tenth Circuit ruled on whether Boulder County had correctly applied its special use regulations or whether Boulder County had a rational basis for its decision. If the correct application of local regulations is irrelevant, then the question presented to Boulder County is whether it should ignore local law when a religious landowner applies for a land use-related permit. Boulder County chose not to ignore its regulations, which resulted in RLUIPA liability. If Boulder County had chosen to ignore its regulations, it may well have faced liability from another source.

Through prior Free Exercise decisions, this Court provided guidance to local governments about the proper application of land use regulations to religious landowners. No such guidance exists for RLUIPA. Instead, local governments face a quagmire of undefined terms, judicial disagreement, and complex constitutional analysis every time a religious landowner applies for a building permit. This case presents the Court with the opportunity to clarify issues essential to local government.

II. The circuits are divided over the Equal Terms and Unreasonable Limitations provisions of RLUIPA.

A. The multi-circuit split over the meaning of the Equal Terms provision

Circuit courts have struggled with balancing the broad, undefined language of the Equal Terms provision against Congress' assertion that the provision merely codifies free exercise principles. *See* Anthony Minervini, Comment, *Freedom from Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial*, 158 U. Pa. L. Rev. 571, 584 (Jan. 2010); Matthias Kleinsasser, *RLUIPA's Equal Terms Provision and the Split Between the Eleventh and Third Circuits*, 29 Rev. Litig. 163, 164 (2009); Misha C. Jacob-Warren, *A Circuit Split: An Interpretation of the Equal Terms Provision of the Religious Land Use and Institutionalized Persons Act*, 34 Seton Hall Legis. J. 57, 66 (2009). The struggle resulted in a circuit split that has caused uncertainty among local governments, widely varying applications of the provision, and concerns about whether the provision can be applied consistently with the First Amendment.

The Eleventh Circuit applies strict scrutiny but eschews any "similarly situated" requirement. *Midrash Sephardi, Inc.*, 366 F.3d at 1230-31; *but see Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1301 (11th Cir. 2006) (applying a "similarly situated" requirement to as-applied Equal Terms claims). The Third Circuit decided that local governments violate the Equal

Terms provision if they treat religious assemblies or institutions "less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose.*" *See Lighthouse Institute for Evangelism, Inc.*, 510 F.3d at 266-68. According to the Third Circuit, the phrase "as to the regulatory purpose" was necessary to avoid rendering the Equal Terms provision unconstitutional. *Id.* at n.14.

The Seventh Circuit, recognizing the circuit split, stated it was "troubled" by the Eleventh Circuit's approach in part because "it may be *too* friendly to religious land uses, unduly limiting municipal regulation and maybe even violating the First Amendment's prohibition against establishment of religion. . . ." *River of Life Kingdom Ministries*, 611 F.3d at 370 (emphasis in original). The Seventh Circuit also determined that the Third Circuit's test was "imperfectly realized." *Id.* at 371. As a result, it found that a local government violates the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to the regulatory *criteria*. *Id.*

Yet another Equal Terms test – and, from Boulder County's perspective, the test most consistent with Free Exercise principles – is about to be examined by the Ninth Circuit. The test involves applying the rational basis test when disparate treatment stems from the application of a neutral and generally applicable law. *See Centro Familiar Christiano Buenas Nuevas v. City of Yuma*, 615 F. Supp. 2d 980 (D. Ariz. 2009). The district court rejected an

interpretation of the Equal Terms provision similar to that used by the Tenth Circuit, stating that such an interpretation would, in essence, "exempt [religious organizations], on the basis of their religious motivation, from land use restrictions faced by all secular organizations. . . ." *Id.* at n.3.

The Tenth Circuit's test differs from those of other circuits because it imposes a "similarly situated" requirement but does not define that element or impose a particular standard of review. App. 11. As discussed *infra*, this approach greatly expands the protection granted to religious landowners and is therefore subject to constitutional challenge.

B. The split between the Tenth Circuit and the Seventh Circuit regarding the Unreasonable Limitations provision

According to the Tenth Circuit, a land use regulation violates the Unreasonable Limitations provision if it has the effect of depriving religious institutions of reasonable opportunities to practice their religions within a particular jurisdiction. App. 15-16. The Tenth Circuit's transformation of the Unreasonable Limitations test into a fact-intensive general reasonableness test contrasts with the approach taken by the Seventh Circuit, the only other circuit court to examine the Unreasonable Limitations provision.

In *Vision Church v. Village of Long Grove*, 468 F.3d at 990-91, the village concluded that its special

use regulations required that the village limit the size of a proposed church. Vision Church claimed that the village's requirement that all new churches obtain a special use permit violated the Unreasonable Limitations provision. The Seventh Circuit, however, found that "[t]he requirement that churches obtain a special use permit is neutral on its face and is justified by legitimate, non-discriminatory municipal planning goals." *Id.* at 991. The Seventh Circuit further concluded that "religious assemblies have a reasonable opportunity to build within the Village, provided that the requirements for a special use permit have been fulfilled." *Id.* The Seventh Circuit based its analysis on its determination that a special use permit requirement is an instrument of municipal planning that is justified by legitimate, non-discriminatory land use goals. *Id.*

III. The Decision Below is Incorrect.

A. The Tenth Circuit erred by adopting an interpretation of the Equal Terms provision that provides special rights for religious uses.

The Equal Terms provision prohibits a government from imposing or implementing a land use regulation that "treats a . . . religious assembly . . . on less than equal terms with a nonreligious assembly. . . ." 42 U.S.C. § 2000cc(b)(1). RLUIPA does not define "treats" or "equal terms." However, the Church, the United States, and every other circuit court that has examined the Equal Terms provision

agree that it must be construed to codify free exercise principles, and specifically the principles in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *See Lighthouse Institute for Evangelism,* 510 F.3d at 264; *Midrash Sephardi*, 366 F.3d at 1232.

Under the Free Exercise Clause, the government may not treat similarly situated entities differently unless the government has at least a rational reason for the difference in treatment. *Engquist v. Oregon Dept. of Ag.*, 553 U.S. 591, 602 (2008). The Free Exercise Clause requires much more than a rational basis – i.e. strict scrutiny – when (1) the law at issue is not neutral and generally applicable on its face; (2) the law arose out of a motivation to discriminate against religion; or (3) the law is selectively applied only against conduct motivated by religious belief. *See Lukumi Babalu*, 508 U.S. at 543. Whether a law or policy is "neutral" is determined by the object of the law. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Id.* at 533. Underlying the general applicability requirement is "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543.

The Tenth Circuit decided that the test for an Equal Terms claims violation is whether a local government treats a religious assembly or institution less favorably in processing, determining and deciding a land use application than a similarly situated

nonreligious assembly or institution. App. 11. Under this formulation, the fact finder never considers a core Free Exercise test: whether the government had a rational, secular basis for its decision. The court attempted to justify its decision not to incorporate rational basis analysis (or its equivalent) into the Equal Terms provision by stating: "[t]he evidence at trial was sufficient to demonstrate the County applied the zoning ordinance non-neutrally"[2] because "the Church was treated less favorably than Dawson School, a similarly situated comparator." App. 14. The flaw in this reasoning is that it equates different treatment with non-neutrality.

Lukumi Babalu dictates that courts impose strict scrutiny when a government selectively enforces a law *only against religiously motivated conduct. See also Snowden v. Hughes,* 321 U.S. 1, 8 (1944) ("The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is . . . an element of intentional or purposeful discrimination. . . . But a discriminatory purpose is not presumed . . . there must be a showing of clear and intentional discrimination.") (citations and quotations omitted). The Tenth Circuit made no finding that Boulder County enforced its special use regulations

---

[2] The Tenth Circuit apparently conflated the concepts of neutrality and general applicability. *See Lukumi Babalu*, 508 U.S. at 533, 543.

only against religious institutions. In fact, even though Boulder County had been administering its special use regulations for more than twenty years, the Church was able to point to only one secular use that allegedly had been treated better than the Church. App. 14. Nor did the Tenth Circuit find that Boulder County enforced its regulations because of the Church's religiously motivated conduct. The appeals court could not have made such a finding without contradicting the jury's finding that Boulder County had *not* discriminated against the Church. Thus, the Tenth Circuit should have interpreted the Equal Terms provision to incorporate the rational basis test – or its equivalent – so that the provision is consistent with Free Exercise principles and does not create special rights for religious uses.

Had the Tenth Circuit construed the Equal Terms provision to incorporate the rational basis test, the Tenth Circuit would have had no choice but to overturn the Equal Terms verdict.[3] Boulder County's decision easily passes the rational basis test because

---

[3] The Tenth Circuit stated that Boulder County "may have waived" its rational basis argument by omitting it from its renewed motion for judgment as a matter of law ("JMOL"). App. 13. However, Boulder County preserved the issue in its JMOL and other contexts. *See* motion for JMOL, A. 2995-2996; motion for summary judgment, A. 1126-27; reply to intervenor's resp. to JMOL, A. 3279; and response to motion for injunction, A. 3135-36. In its ruling on Boulder County's renewed JMOL, the district court acknowledged that Boulder County raised the rational basis argument and ruled on it. App. 44.

it had legitimate secular reasons for concluding that conditional approval of the Dawson School application would advance its land use preservation goals and that approval of the Church's entire application would conflict with those goals. Both decisions resulted from an unbiased and thorough application of the special use criteria, which were enacted to further the goals of the County's Comprehensive Plan. A. 6831 § 1-300, 4601:20-24. The Commissioners decided to partially deny the Church's application because the application did not comply with three of the special use criteria. *See* A. 5710-13. Two Commissioners testified about why they believed a 240,000 square foot facility in a semi-rural area would be contrary to the goal of preserving a buffer of agricultural and open space uses around the community. A. 5066:18-5067:23, 5094:7-5095:6, 5101:7-5105:20, 5022; 5039.

In contrast, ten years earlier, three different Commissioners concluded in a very different factual context that the Dawson School application advanced Boulder County's preservation goals. Immediately prior to Boulder County's decision on that application, Dawson School considered annexing its 700 acres into a nearby city. A. 4913:24-4915:20. To avoid an annexation war that would have resulted in intense urban development in an agricultural area, Boulder County facilitated a three-way intergovernmental agreement ("IGA"). A. 4913:24-4914:17, 5841-5855. The agreement preserved the rural setting because Dawson School remained in an unincorporated area with a 650-acre open space buffer around the site.

A. 4914:18-4917:6. The IGA avoided the ten-fold increase in density that would have occurred if a bordering city annexed the site. A. 1147. The critical issue in determining whether Boulder County violated the Equal Terms provision is whether Boulder County lacked any rational basis for denying in part the Church's application in 2006 after conditionally approving the Dawson School in 1995, which would violate the principles of neutrality and general applicability.

B. The Tenth Circuit erred by determining an Unreasonable Limitations violation is essentially a fact intensive, general reasonableness review of land use actions that affect religious landowners in a jurisdiction.

RLUIPA prohibits a land use regulation that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3)(B). Unlike the Equal Terms provision, which can be traced to the Free Exercise protections set forth in *Lukumi Babalu,* the Unreasonable Limitations provision does not arise from Free Exercise jurisprudence. Instead, Congress intended the provision to mirror free speech protections developed in the context of nude dancing cases. *See* H.R. Rep. 106-219 at 29 (1999) (citing *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981)). The term "unreasonably limits" appears to derive from *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986), which

stated that content-neutral time, place, and manner regulations "are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."

It is difficult to reconcile the Unreasonable Limitations provision with cases such as *Schad* and *Renton*. Those cases deal with regulations that limit expressive activity; whereas the Unreasonable Limitations provision applies to *all* land use regulations, even those that do not impact expressive activity. Moreover, the phrase "unreasonably limits" applies to alternative forms of communication not mentioned in RLUIPA.

On the other hand, an important commonality between these free speech cases and the Unreasonable Limitations provision is that they both address the *facial* validity of a regulation. The Unreasonable Limitations provision requires that courts focus on the land use regulation being imposed or implemented and not the *manner* in which the land use regulation is imposed or implemented. *Contrast* 42 U.S.C. § 2000cc(b)(3) ("No government shall impose or implement a land use regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction") with 42 U.S.C. § 2000cc(a)(1) ("No government shall impose or implement a land use regulation *in a manner that* imposes a substantial burden. . . .") (emphasis added).

As it did with the Equal Terms provision, the Tenth Circuit read the Unreasonable Limitations provision (which Congress intended to reflect existing constitutional requirements) as a novel, more expansive right for religious landowners. Specifically, the appeals court found that an Unreasonable Limitations violation occurred if a regulation, as applied or implemented, had the effect of depriving religious institutions or assemblies of reasonable opportunities to practice their religion within a jurisdiction. App. 15. Under this formulation, a fact finder is charged with performing a general reasonableness review of all decisions within a jurisdiction that may have affected religious uses. To respond to such a broad reading of the provision, a local government must defend every zoning decision or action it has ever made that potentially affected a religious use against an undefined reasonableness evaluation.

The Tenth Circuit took this test one step further by not limiting as-applied Unreasonable Limitations claims to those based on final government decisions. Instead, contrary to the rule established for other civil rights cases in *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 691-95 (1978), the Tenth Circuit found that Boulder County could be liable under what amounts to *respondeat superior* liability. App. 16-17. For example, the Tenth Circuit pointed to errors in a staff report, the timing of the release of a staff report, and a hearsay statement by a former county commissioner eight years prior to the Church's application, as evidence that Boulder County violated the

Unreasonable Limitations provision. *Id.*; A. 4542-44. Thus, under the Tenth Circuit's formulation, any action by a government employee – not just policies or final decisions – may be the basis of an Unreasonable Limitations claim.

Properly interpreted, the Unreasonable Limitations provision prohibits local governments from crafting land use regulations that, on their face, come close to excluding all religious uses within a jurisdiction. *See, e.g., Schad*, 452 U.S. 61. If the Tenth Circuit had correctly applied the provision to Boulder County's land use regulations it could not have found a violation. Boulder County's regulations allow churches in all but one of Boulder County's zoning districts, and the regulations exempt small churches from special review. A. 3996, 6916. "The requirement that churches obtain a special use permit is neutral on its face and is justified by legitimate, non-discriminatory planning goals." *Vision Church,* 468 F.3d at 991. Thus, the Tenth Circuit erred in finding that the Church presented sufficient evidence of an Unreasonable Limitations violation.

C. If the Tenth Circuit's interpretation of the Equal Terms and Unreasonable Limitations provisions is correct, then those provisions of RLUIPA are unconstitutional as applied.

The Tenth Circuit's interpretation of the Equal Terms and Unreasonable Limitations provisions

results in a significant expansion of rights granted to religious landowners.[4] Local governments may be liable under the Equal Terms provision even when they rationally apply a neutral, generally applicable regulation. Similarly, the Tenth Circuit's application of the Unreasonable Limitations provision subjects local governments to potential liability for any action a government or government employee takes that affects religious exercise. The only test is what is "reasonable" – without any statutory or judicial guidance about what "reasonable" means. Local governments will have little choice but to approve every request from religious landowners. RLUIPA will trump local zoning laws when it comes to religious uses. Because such formulations of RLUIPA's provisions are so broad, their application violates Section 5 of the Fourteenth Amendment and the Establishment Clause.

---

[4] The Tenth Circuit avoided a discussion of whether its interpretation of RLUIPA was unconstitutional as applied by claiming that Boulder County did not adequately preserve its constitutionality argument. App. 18. Regardless of whether Boulder County preserved this argument, the circuit court was obligated to interpret RLUIPA in a manner that avoids an unconstitutional construction. *See Chapman v. U.S.*, 500 U.S. 453, 464 (1991).

1. The Tenth Circuit's interpretations violate Section 5 of the Fourteenth Amendment.

Under Section 5 of the Fourteenth Amendment, Congress may only impose on the states restrictions that are more onerous than the Constitution's requirements when two criteria are met. First, there must be proof of widespread and persisting unconstitutional conduct by the states. *See Tennessee v. Lane*, 541 U.S. 509, 526-29 (2004).[5] Second, the federal legislation must be "congruen[t] and proportional" to the constitutional evils identified. *Id.* at 531.

Even assuming Congress established a sufficient record of unconstitutional conduct by the States, the extensive judicial review imposed by the Tenth Circuit is not congruent or proportional to the problems RLUIPA purports to remedy. Although this Court has recognized that regulation of land use is a core function of local governments, the Tenth Circuit's interpretation mandates a "hands-off" approach when it comes to religious uses. Without a rational basis review of the government action, courts make no attempt to consider the governmental interests. Moreover,

---

[5] The legislative record of RLUIPA does not establish widespread and persistent constitutional violations against religious institutions in local and state land use regulations. *See* Marci A. Hamilton, *Federalism and the Public Good: The True Story behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 335 (2003).

RLUIPA violations may occur even if the underlying religious exercise is not substantially burdened.

An approach that, as a practical matter, exempts religious uses from land use regulations, makes RLUIPA "a piece of legislation [that] attempts substantively to redefine a constitutional guarantee." *Lane*, 541 U.S. at 531 n.18. For this reason, RLUIPA, as applied, exceeds Congress' power.

2. As applied, the Equal Terms and Unreasonable Limitations provisions are an improper accommodation of religion in violation of the Establishment Clause.

The Equal Terms and Unreasonable Limitations provisions are an attempt by Congress to codify First Amendment protections previously recognized by this Court. But, as the Tenth Circuit has interpreted and applied these provisions, local governmental decisions are subject to such searching judicial scrutiny that it is nearly impossible to limit a religious use without violating RLUIPA. As a practical matter, religious landowners will be exempt from local land use codes. This is a "constitutional anomaly," a private right to ignore generally applicable laws. *See Smith*, 494 U.S. at 886. As a result, it is an "accommodation" that crosses the boundary from permissible to impermissible. *See, e.g., Texas Monthly, Inc.*, 489 U.S. 1. When huge religious structures are permitted in otherwise rural and residential areas while similar structures are prohibited, the appearance of religious favoritism

and endorsement will be unavoidable. *See Lynch v. Donnelly*, 465 U.S. 668, 714 (1984) (Brennan, J., dissenting) ("[G]overnment is to remain scrupulously neutral in matters of religious conscience . . . [and] must avoid those overly broad acknowledgments of religious practices that may imply governmental favoritism. . . ."). The Tenth Circuit's interpretation of the Equal Terms and Unreasonable Limitations provisions violates the Establishment Clause.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

DAVID HUGHES, Deputy County Attorney
Counsel of Record
BOULDER COUNTY ATTORNEY
P.O. Box 471
Boulder, CO 80306
(303) 441-3190

JEAN E. DUBOFSKY
THE DUBOFSKY LAW FIRM, P.C.
1000 Rose Hill Dr.
Boulder, CO 80302
(303) 447-3510

JOHN R. BAUER
ROBINSON & COLE, LLP
One Boston Place
Boston, MA 02108
(617) 557-5900

2010 WL 2802757

United States Court of Appeals,
Tenth Circuit.
ROCKY MOUNTAIN CHRISTIAN CHURCH,
Plaintiff-Appellee,
and
United States of America,
Intervenor-Plaintiff-Appellee,
v.
BOARD OF COUNTY COMMISSIONERS of Boulder County, Colorado, Defendant-Appellant.
Colorado Counties, Inc.; The Colorado Municipal League; The National League of Cities, Inc.; The International Municipal Lawyers Association; American Planning Association; Colorado Chapter of the American Planning Association; American Jewish Congress; National Council of Churches; Queens Federation of Churches; General Conference of Seventh-Day Adventists; Union of Orthodox Jewish Congregations of America; National Committee for Amish Religious Freedom; Archdiocese of Denver; Archdiocese of Kansas City in Kansas; Archdiocese of Oklahoma City; Association of Christian Schools International; Cherry Hills Community Church; Christian & Missionary Alliance; Colorado Christian University; Diocese of Colorado Springs; Episcopal Diocese of Colorado; Episcopal Diocese of Wyoming; Evangelical Christian Credit Union; First Presbyterian Church of Colorado Springs; General Conference of the Church of God (Seventh Day); New Life Church; O Centro Espirita Beneficente Uniao Do Vegetal; Regis University; Village Seven Presbyterian Church, Amici Curiae.
No. 09-1188.

App. 2

July 19, 2010.

Appeal from the United States District Court for the District of Colorado (D.C. No. 06-CV-00554-REB-BNB).David Hughes, Boulder County Attorney, Boulder, CO (Jean E. Dubofsky, Esq. of The Dubofsky Law Firm, P.C., Boulder, CO; H. Bissell Carey, III, Esq., John R. Bauer, Esq. and Dwight H. Merriam, Esq. of Robinson & Cole, L.L.P., Boston, MA, with him on the briefs), for Defendant-Appellant.

Kevin T. Baine of William & Connolly, LLP, Washington, D.C. (Eva Petko Esber and Curtis J. Mahoney of Williams & Connolly, LLP, Washington, D.C.; Eric Rassbach and Lori Windham of The Becket Fund for Religious Liberty, Washington, D.C.; J. Thomas MacDonald of Otten, Johnson, Robinson, Neff & Ragonetti, P.C., Denver, CO, with him on the brief), for Plaintiff-Appellee.

Lowell Sturgill, Attorney, Appellate Staff, Civil Division of Department of Justice (Tony West, Assistant Attorney General, Troy A. Eid, United States Attorney, and Michael S. Raab, Attorney, Appellate Staff, Civil Division, Department of Justice, Washington, D.C., with him on the brief), for Intervenor-Appellee the United States of America.

Beth A. Dickhaus, Hall & Evans, L.L.C., Geoffrey T. Wilson, Colorado Municipal League, Denver, CO, Devala A. Janaradan, International Municipal Lawyers Association, Bethesda, MD, and Lars Etzkorn, Center for Federal Relations National League of Cities, Washington, D.C., filed an Amicus Curiae brief

for Colorado Counties, Inc., Colorado Municipal League, International Municipal Lawyers Association, and National League of Cities, in support of Defendant-Appellant.

Deborah M. Rosenthal and Brenna Moorhead, Sheppard, Mullin, Richter & Hampton LLP, San Francisco, CA, filed an Amici Curiae brief for American Planning Association & the Colorado Chapter of the American Planning Association in support of Defendant-Appellant.

Robert L. Greene, Storzer & Greene, P.L.L.C., New York, NY, and Edward R. McNicholas, Patrick K. O'Keefe, and Richard H. Menard, Jr., Sidley & Austin, LLP, Washington, D.C., filed an Amici Curiae brief for American Jewish Congress, The National Council of Churches, the Queens Federation of Churches, the General Conference of Seventh-day Adventists, the Union of Orthodox Jewish Congregations of America and the National Committee for Amish Religious Freedom in support of Plaintiff-Appellee.

Eric V. Hall and L. Martin Nussbaum, Rothgerber Johnson & Lyons LLP, Colorado Springs, CO, filed an Amici Curiae brief for Archdiocese of Denver, Archdiocese of Kansas City in Kansas, Archdiocese of Oklahoma City, Association of Christian Schools International, Cherry Hills Community Church, Christian & Missionary Alliance, Colorado Christian University, Diocese of Colorado Springs, Episcopal Diocese of Colorado, Episcopal Diocese of Wyoming,

Evangelical Christian Credit Union, First Presbyterian Church of Colorado Springs, General Conference of the Church of God (Seventh Day), New Life Church, O Centro EspiritaBeneficente Uniao do Vegetal, Regis University, Village Seven Presbyterian Church, in support of Plaintiff-Appellee.

Before KELLY, MURPHY and O'BRIEN, Circuit Judges.

Opinion on Rehearing

KELLY, Circuit Judge.

The Board of County Commissioners of Boulder County ("the County"), Defendant-Appellant, appeals the district court's denial of judgment as a matter of law and entry of a permanent injunction following a jury verdict for Rocky Mountain Christian Church ("RMCC") on three counts of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc. The jury found that the County's denial of RMCC's special use application violated RLUIPA's substantial burden, equal terms, and unreasonable limitations provisions. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

Background

In 1978, Boulder County adopted its Comprehensive Plan, an advisory land use scheme with the goals of curbing urban sprawl, maintaining open space to preserve the county's rural character, and sustaining agriculture. Aplt.App. 4892-96, 5724, 5728-31. The

County amended its Land Use Code ("the Code") in 1983 to implement the Comprehensive Plan. *Id.* at 4601-02, 6831. The Code divides the County into thirteen categories of zoning districts, including Agricultural Districts. *Id.* at 6837. RMCC is located in an Agricultural District, where offices, warehouses, and retail stores are prohibited. *Id.* at 6842-43. In 1994, the County amended the Code to require all facilities in an Agricultural District with occupancy loads exceeding 100 people to apply for a special use permit. *Id.* at 3917-18, 6844-45. The special use process entails an application to the County's land use office, and public hearings and votes before both the Planning Commission and the County Commission. *Id.* at 3407-08. The County uses eleven criteria to evaluate special use applications, including objective criteria like height requirements and subjective criteria such as harmony with the character of the neighborhood and compatibility with the surrounding area, "accordance with the comprehensive plan," and not "an over-intensive use of land or excessive depletion of natural resources." *Id.* at 3921-24, 6965.

RMCC is located in a rural, agricultural zone in Niwot, an unincorporated part of the County. *Id.* at 3966-67. In the general area are several "Planned Unit Development" subdivisions, a wastewater treatment facility, a high school, and the 500,000 square foot Boulder Technology Center.[1] *Id.* at 4105-07. Since

---

[1] The high school is not subject to the County's zoning authority and the Boulder Technology Center's industrial zoning

(Continued on following page)

its founding in 1984, RMCC has grown in stages to its current state as the County's largest church complex: a 106,000 square foot main building, a 2,600 square foot maintenance building, and 7,200 square feet of temporary modular units on 55 acres. *Id.* at 3411, 4077. RMCC's campus also includes its 380-student K-8 school, the Rocky Mountain Christian Academy. *Id.* at 3403. Although RMCC was allowed to expand without any special use applications until the 1994 amendments to the Land Use Code, after 1994 RMCC was a non-conforming use. *Id.* at 3409, 4060. RMCC applied in 1997 for a special use permit to make the existing structure conforming and to construct a 54,000 square foot school. The County Commission approved the application over the opposition of the County land use office. *Id.* at 3409-10. The County again approved RMCC's 2002 special use application against the land use staff's recommendation, this time for an expansion of the student body by 120 students and the placement of temporary modular units on the campus. *Id.* at 3410, 5648. The County attached two conditions to its approval: that RMCC remove the modular units after three years, and that RMCC submit a master plan outlining future development. *Id.* at 3410, 3677, 3944-54, 4166. The County denies imposing the master plan condition. *Id.* at 3944-54; Aplt. Reply at 10 n. 8.

---

district predates the Comprehensive Plan. Aplt. Reply at 5. Nonetheless, both structures contribute to the overall character of the area surrounding RMCC.

The special use application at issue in this case, submitted in 2004, initially sought approval for 150,200 additional square feet. Aplt.App. 5680. RMCC scaled that request back by 20,000 square feet. *Id.* at 3411. The final application proposed a 28,000 square foot gymnasium, a 6,500 square foot chapel, expanding the school building by 57,500 square feet, gallery space connecting the buildings, and an expansion of the main worship building's seating capacity by 150 seats. *Id.* at 6460. The scale of RMCC's proposal was based on an outside consultant's estimate of the church's needs over the next twenty years. *Id.* at 3691-93.

The 2004 special use application met opposition at each level of review. The County's land use staff found that the application met the objective requirements, but conflicted with the subjective goals of the Comprehensive Plan. *Id.* at 5677-78. In particular, the land use staff deemed the proposed expansion incompatible with the surrounding area, an over-intensive use of the land, likely to cause undue traffic congestion, and likely detrimental to the welfare of the residents of Boulder County. *Id.* at 5674-77. The staff report used an unusual method to find that the expansion would be an over-intensive use: typically, a proposed use is not over-intensive if less than 50% of the site's surface area would be covered by a structure or a parking lot, and in this case the expansion would only result in 35% coverage. *Id.* at 3976-78, 4109-12, 4186-87, 5674. Instead, the land use staff deemed the expansion an over-intensive use because it doubled

the church's square footage and significantly increased the parking area. *Id.* at 5674. The Planning Commission voted against the application after a public hearing, at which one commissioner privately greeted RMCC's consultant by saying, "Rosi, you can bring in your Christians now." *Id.* at 4190, 5703. The public hearings and other public input, both before the Planning Commission and County Commission, confirm that the application was a divisive issue, and many of those opposed voiced concerns similar to those which both bodies found persuasive. *Id.* at 5406-5577. The County Commission issued the final partial denial, denying the application except for the capacity increase of 150 seats and the 10,000 square foot building to replace the modular units. *Id.* at 5706-15.

Procedural History

After the denial, the County sought a declaratory judgment that it had not violated RLUIPA. The district court dismissed the action for lack of subject matter jurisdiction. *Bd. of County Comm'rs of Boulder County v. Rocky Mountain Christian Church,* 481 F.Supp.2d 1181, 1190 (D.Colo.2007). At the same time, RMCC sued the County under RLUIPA. At the close of RMCC's evidence at trial, the County moved for judgment as a matter of law under Rule 50(a). Aplt.App. 2992-3014. The district court deferred the County's motion with regard to the County's affirmative defenses, and denied the rest. *Id.* at 4980-89. After a twelve-day trial, the jury found for RMCC on

the substantial burden, equal terms, and unreasonable limitations claims, but found for the County on the nondiscrimination claim arising under RLUIPA. *Id.* at 3107-08. The jury did not award RMCC any damages. *Id.* at 3112-13. Nonetheless, the district court entered a permanent injunction requiring the County to approve RMCC's special use application. *Id.* at 3329-38. The district court denied the County's renewed motion for judgment as a matter of law. *Id.* at 3286-3328. The County appeals.

Discussion

The County argues that evidence at trial was insufficient to show that it violated the substantial burden, equal terms, and unreasonable limitations provisions of RLUIPA. If we find that sufficient evidence existed for the jury's substantial burden verdict, the County argues that the substantial burden provision of RLUIPA is unconstitutional facially and as applied to this case. Finally, the County challenges the court's entry of a permanent injunction requiring it to grant RMCC its special use permit. Aplt. Br. at 16-17.

I. Sufficiency of the Evidence

This court "reviews de novo the district court's denial of a motion for judgment as a matter of law." *Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 949 (10th Cir.2004) (internal citation omitted). "To overturn a denial, we must conclude that, viewed in the

light most favorable to the non-moving party, the evidence and all reasonable inferences to be drawn from it point but one way, in favor of the moving party." *Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245, 1250 (10th Cir.2005). That is, the County must demonstrate that there are "no reasonable inferences" supporting the jury's verdict. *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 761 (10th Cir.2009). "In reviewing the record, we will not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury." *Hysten v. Burlington N. Santa Fe Ry. Co.*, 530 F.3d 1260, 1269 (10th Cir.2008) (citation and quotation marks omitted). Most importantly, we may not "substitute our judgment for that of the jury." *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1226 (10th Cir.2000) (citation and quotation marks omitted).

In this case, we review the sufficiency of the evidence against the controlling law, which we find to be properly stated in the district court's jury instructions.[2] The County raised some objections to the

---

[2] Where a party has previously alerted the district court as to a legal issue that would preclude submission of the case to the jury, the sufficiency of the evidence is reviewed against the correct legal standard, notwithstanding a failure to object to a jury instruction. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 119-120, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (plurality op.); *Fisher v. City of San Jose*, 558 F.3d 1069, 1074 (9th Cir.2009) (en banc); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1517 (10th Cir.1984), *aff'd*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). In this case, the jury instructions correctly stated the applicable law.

district court's jury instructions below, *see* Aplt.App. 5176-81, 5185-88, 5211-12, 5214-15, but it acknowledged at oral argument that it has not challenged the instructions on appeal.

A. Equal Terms

RLUIPA forbids a government from "impos[ing] or implement[ing] a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). To prove this claim, the district court properly instructed the jury that RMCC must establish "that [the County] treated [RMCC] less favorably in processing, determining, and deciding the 2004 special use application of the [RMCC] than [the County] treated a similarly situated nonreligious assembly or institution." Aplt.App. 3084.

The County argues that RMCC did not present sufficient evidence for the jury to find that it violated RLUIPA's equal terms provision and that, in any case, it enjoys a full defense because its denial was rationally related to a legitimate governmental interest. Aplt. Br. at 30-34. Specifically, the County argues that the evidence did not show that RMCC was similarly situated to the comparator used at trial, Dawson School. *Id.* at 31-33. The County approved Dawson School's 1995 special use application for expansion within an Agricultural District.

Aplt.App. 4152. The County highlights several differences between RMCC's application and the School's 1995 application. The School's expansion was half the size of RMCC's in terms of raw square footage (132,200 versus about 60,000). *Id.* at 4725-36, 6460. The School had proposed multiple small buildings compared to RMCC's larger structures. *Id.* at 4154-55, 4708. And RMCC's resulting traffic would exceed Dawson School's resulting traffic (after their respective expansions) by ten times. *Id.* at 4710-11.

Nonetheless, RMCC presented ample evidence of similarities between the projects at trial. Both Rosi Koopman, RMCC's expert and planning consultant, and Benjamin Herman, the County's expert, testified that the total resulting square footage of the two projects was similar (Dawson School resulted in 196,000 square feet and RMCC would have totaled 240,800). *Id.* at 4212, 4708, 6460. Both proposals would have expanded existing uses, both would have built gymnasiums of roughly the same size, both would have expanded their student bodies by 120 students, and both properties were located in Agricultural Districts and designated as agricultural lands of importance. *Id.* at 4152-56. The Dawson School and RMCC applications also proposed similarly sized "buffers" (the distance between the building and the property line). *Id.* at 4159. Although the two proposed expansions were not identical, the many substantial similarities allow for a reasonable jury to conclude that RMCC and Dawson School were similarly situated.

In the alternative, the County argues that RLUIPA's equal terms provision is subject to an affirmative defense: a generally applicable law that is rationally related to a legitimate governmental interest cannot violate the equal terms provision. Aplt. Br. at 33-34.

At the first step, the County may have waived this argument by omitting it from its renewed motion for judgment as a matter of law, Aplt.App. 3155-60. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404, 126 S.Ct. 980, 163 L.Ed.2d 974 (2006) ("[T]he precise subject matter of a party's Rule 50(a) motion . . . cannot be appealed unless that motion is renewed pursuant to Rule 50(b)."); *Kellogg v. Energy Safety Servs. Inc.*, 544 F.3d 1121, 1128 (10th Cir.2008) (failure to raise a specific argument in its pre-verdict and post-verdict motions "precludes our review").

Even so, the law does not support the defense in this case. Other circuits disagree whether RLUIPA implicitly includes an affirmative defense. This debate centers around whether Congress intended to codify Free Exercise Clause jurisprudence. *Compare Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir.2004) *with Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 269 (3rd Cir.2007). This theory, and the County's argument, rest on a congressional floor statement by one of RLUIPA's sponsors. *See Midrash Sephardi*, 366 F.3d at 1231-32; Aplt. Br. at 30 ("The equal terms provision 'enforce[s] the Free Exercise Clause rule

against laws that burden religion and are not neutral and generally applicable." (quoting 146 Cong. Rec. S7774-01, *S7776 (2000))).

If the equal terms provision includes an affirmative defense based on Free Exercise Clause jurisprudence, a rational basis defense is warranted only for neutral, generally applicable laws. *Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643, 649 (10th Cir.2006) (citing *Employment Div. v. Smith,* 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)). By contrast, it is well-settled that rules which are discriminatorily applied are subject to strict scrutiny, not rational basis review. *Axson-Flynn v. Johnson,* 356 F.3d 1277, 1294 (10th Cir.2004); *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (holding the Free Exercise Clause "forbids subtle departures from neutrality" and the "covert suppression of particular religious beliefs" (quotations omitted)). The evidence at trial was sufficient to demonstrate the County applied the zoning ordinance non-neutrally. As noted above, the Church was treated less favorably than Dawson School, a similarly situated comparator. Further, there was evidence the County singled out the Church for adverse treatment in "processing" and "determining" its application. For example, the County applied a less advantageous method to calculate whether the Church's proposed use was over-intensive, and treated the Church's application as a new application, even though it was an existing use. Aplt.App. 4186-88. As a result, if an

affirmative defense to the equal terms provision exists, only a strict scrutiny defense would apply here. The County has not argued that it should enjoy a strict scrutiny defense to the equal terms provision, and thus the argument is waived. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir.1998). Given this waiver, we need not decide whether the equal terms provision includes an affirmative defense.

Without an affirmative defense to the equal terms provision, the County is left only with its sufficiency of the evidence argument. The district court appropriately denied the County's motion for judgment as a matter of law with respect to the equal terms claim.

B. Unreasonable Limitations

RLUIPA forbids a government from "impos[ing] or implement[ing] a land use regulation that – (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3). The district court's instruction properly required RMCC to establish that the County's "regulation, as applied or implemented, has the effect of depriving both [RMCC] and other religious institutions or assemblies of reasonable opportunities to practice their religion, including the use and construction of structures, within Boulder County." Aplt.App. 3090. The jury was also properly instructed that it could "find that the land use regulation . . .

imposes unreasonable limits even though religious assemblies are not totally excluded from Boulder County." *Id.*

The County claims that RMCC presented "no evidence at trial of any limitations on opportunities for churches in Boulder County." Aplt. Br. at 35. It points to testimony by Graham Billingsley, the County's land use director, and Rosi Koopman, RMCC's expert and a previous employee of the County's land use office for twelve years, that the County had approved all other special use applications submitted by churches. Aplt.App. 4144, 4217. However, Ms. Koopman also testified that the County's land use scheme has made it "more difficult for churches to operate in Boulder County," *id.* at 4213, and has effectively left few sites for church construction, *id.* at 4216-22. Another witness, Regina Hyatt, testified that she approached a County commissioner about the possibility of building a synagogue but was told that the County would only allow 100 seats because "there will never be another mega church . . . in Boulder County." *Id.* at 4543-44. Further testimony related that another congregation ran out of money going through the County's special use application process and abandoned its building project. *Id.* at 4178-79.

RMCC presented evidence of its unsuccessful attempts to appease the County's concerns. *Id.* at 4174-75, 4204-06. The church took several steps to minimize the expansion's visual impact on the neighborhood, including hiring a surveyor to confirm that

the church's proposed landscaping and berming would block all views of the expanded building from every neighboring home. *Id.* at 3736-40. The jury also learned of disparate treatment by the County land use staff between the Planning Commission and County Commission hearings. Typically, unless the applicant has changed its application, the County land use staff does not substantially change its report after the Planning Commission meeting, but rather adds a summary description. *Id.* at 4192. After RMCC's Planning Commission meeting, however, the County land use staff issued a new report with calculations based on erroneous lot sizes and building square footage and an analysis that Rosi Koopman found "embellished significantly." *Id.* at 4192-98. Given the timing of the report's release just before the County Commission hearing, RMCC requested a postponement and spent more time and money responding to the report. *Id.* at 4198-4201.

This testimony was more than adequate for a reasonable jury to find for RMCC on this claim. The jury could choose to weigh evidence of the County's land use regulation effectively excluding churches more heavily than the County's record of approving special use applications. The jury could also conclude that the County's implementation of the land use regulation was unreasonably restrictive in this case. Because sufficient evidence existed for the jury's unreasonable limitations verdict, the district court did not err when it denied the County's motion for judgment as a matter of law.

C. Substantial Burden

Because we affirm the permanent injunction on the basis of the equal terms and unreasonable limitations verdicts, as discussed below, we need not review the sufficiency of the evidence of the substantial burden claim.

II. Constitutional Challenges

Although the County makes various constitutional arguments on appeal, it has preserved only its challenge to the constitutionality of RLUIPA's substantial burden provision. The County consistently argued before the district court and on appeal that the substantial burden provision is unconstitutional as applied in this case and facially unconstitutional. Aplt.App. 3145-55. Therefore, the County preserved those challenges. The County waived its constitutional challenges to the equal terms and unreasonable limitations provisions, however, because its mention of those arguments in its opening brief, Aplt. Br. at 38 n. 7, is too cursory and undeveloped for review. *See Am. Airlines v. Christensen,* 967 F.2d 410, 415 n. 8 (10th Cir.1992).

Without viable challenges to the equal terms and unreasonable limitations provisions, we need not reach the County's challenges to the substantial burden provision. Generally, we "wish to avoid, when possible, deciding constitutional questions and thereby overturn legislative enactments and etch in stone rules of law beyond the reach of most democratic

process." *United States v. Cardenas-Alatorre*, 485 F.3d 1111, 1115 n. 9 (10th Cir.2007) (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)). The district court based the permanent injunction on all three RLUIPA counts. Because the jury's verdicts on the equal terms and unreasonable limitations claims are sufficient to support the injunction, we do not address the constitutionality of RLUIPA's substantial burden provision. *See Escambia County, Fla. v. McMillan*, 466 U.S. 48, 51, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) (declining to reach constitutional question where the lower court's decision could be affirmed based on other grounds).

III. Permanent Injunction

The County claims that the district court erred in granting RMCC a permanent injunction because the injunction is inconsistent with the jury's finding of no damages and it is not narrowly tailored to remedy the harm shown. Aplt. Br. at 48-55. This court reviews a district court's grant of a permanent injunction for abuse of discretion. *John Allan Co. v. Craig Allen Co.*, 540 F.3d 1133, 1142 (10th Cir.2008). "A district court abuses its discretion when it issues an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Id.* (internal quotations marks and citation omitted).

Both arguments lack merit. Although "a district court is bound both by a jury's explicit findings of fact

and those findings that are necessarily implicit in the jury's verdict," *Bartee v. Michelin N. Am., Inc.*, 374 F.3d 906, 912-13 (10th Cir.2004), a lack of monetary damages is not necessarily inconsistent with a permanent injunction. Equitable relief may be appropriate where a defendant is liable in part because damages are not quantifiable. *See Sw. Stainless, LP v. Sappington*, 582 F.3d 1176, 1191-92 (10th Cir.2009). RMCC correctly observed that "the only proper inference that can be drawn from its damages verdict is that the Church did not adequately prove monetary damages." Aplee. Br. at 66. Nonetheless, the court fashioned a remedy in light of the jury's verdict in favor of RMCC on the RLUIPA counts. The injunction is consistent with the jury's verdict on both the RLUIPA claims and damages.

The County does not demonstrate that the injunction is so out of proportion to the harm as to constitute an abuse of discretion. The County contends that the district court did not adequately weigh the County's interests in open space, and that RMCC's expansion was far greater than necessary for growth. Of course, "an injunction must be narrowly tailored to remedy the harm shown." *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 962 (10th Cir.2002). The district court's injunction included the entire special use application because otherwise RMCC would have to "substantiate its specific current needs as those needs arise," thereby requiring RMCC to plan its expansion in piecemeal fashion. Aplt.App. 3336. Such a requirement, the

court reasoned, "would impose a different burden on the RMCC, and likely would cause the RMCC to be treated differently than similar secular institutions." *Id.* Contrary to the County's claims, the district court plainly weighed the County's zoning interests: the court did not agree that RMCC's special use application violated the County Land Use Code, and found that RMCC's statutory right to free exercise of religion outweighed the negative impacts of expansion on the community. *Id* . at 3333. These determinations are certainly not "manifestly unreasonable." Even without the substantial burden verdict, the verdicts in favor of RMCC on the equal terms and unreasonable limitations claims adequately support the district court's reasoning. Therefore, we find that the scope of the permanent injunction did not constitute an abuse of discretion.

AFFIRMED.

612 F.Supp.2d 1157

United States District Court,
D. Colorado.
ROCKY MOUNTAIN CHRISTIAN CHURCH,
Plaintiff,
and
United States of America, Intervenor Plaintiff,
v.
BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, Colorado, Defendant.
Civil Case No. 06-cv-00554-REB-BNB.

March 30, 2009.

Amy L. Nafziger, Darrell Gene Waas, J. Thomas MacDonald, Thomas J. Ragonetti, Kathryn Irene Hopping, Otten, Johnson, Robinson, Neff & Ragonetti, P.C., Denver, CO, for Plaintiff.

Peter Michael Bryce, Varu Chilakamarri, U.S. Department Of Justice, Federal Programs Branch, Washington, DC, for Intervenor Plaintiff.

David Evan Hughes, Patricia A. Mayne, Boulder County District Attorney's Office, Boulder, CO, Dwight H. Merriam, Robinson & Cole, LLP, Hartford, CT, Hiram Bissell Carey, III, John R. Bauer, Michael Steven Giaimo, Robinson & Cole, LLP, Boston, MA, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PERMANENT INJUNCTION & DIRECTING ENTRY OF JUDGMENT

BLACKBURN, District Judge.

This matter is before me on the **Plaintiff's Motion for Permanent Injunction** [# 270][1], filed November 25, 2008. The defendant filed a response [# 274] and the plaintiff filed a reply [# 284]. The defendant filed also a notice of supplemental authority [# 287]. I grant the motion in part and deny it in part. Further, I direct the entry judgment in favor of the plaintiff on the jury's verdicts in favor of the plaintiff, and the entry of judgment in favor of the defendant on the jury's verdicts in favor of the defendant.

I. JURISDICTION

I have subject matter jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343(a) (deprivation of federally protected rights and privileges), and 28 U.S.C. § 1367(a) (supplemental jurisdiction).

---

[1] "[# 270]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's electronic case filing and management system (CM/ECF). I use this convention throughout this order.

II. BACKGROUND

This case was tried to a jury from November 3 to November 19, 2008. At the conclusion of the trial, the jury returned verdicts in favor of the plaintiff, Rocky Mountain Christian Church (RMCC), on three claims under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-2000cc-5. Specifically, the jury found for the RMCC on the RMCC's claims under (1) RLUIPA's equal terms provision, § 2000cc(b)(1); (2) RLUIPA's substantial burden provision, § 2000cc(a); and (3) RLUIPA's unreasonable limitations provision, § 2000cc(b)(3)(B). The jury found in favor of the defendant on all other claims, including the RMCC's other claim under RLUIPA and the RMCC's claims alleging violation of the United States Constitution and the Constitution of the State of Colorado. The jury awarded no monetary damages to the RMCC.

In my **Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law,** which is entered concurrently with this order, I have denied the BOCC's motion for judgment as a matter of law [# 279]. In that motion, and in response to the RMCC's motion for permanent injunction, the BOCC has argued that it is entitled to judgment as a matter of law on the RMCC's successful claims under RLUIPA's equal terms, substantial burden, and unreasonable limitations provisions. The BOCC argues that certain affirmative defenses are applicable to these claims, and that the evidence presented at trial establishes those affirmative defenses. Those

affirmative defenses present questions of law for the court and, in my order denying the BOCC's motion for judgment as a matter of law, I conclude that the BOCC is not entitled to judgment based on those affirmative defenses. In addition, I conclude in that order that the evidence presented at trial was sufficient to sustain the jury's verdicts and that the RLUIPA's equal terms, substantial burden, and unreasonable limitations provisions are constitutional as applied in this case.

The RMCC's claims in this case are based on the BOCC's partial denial of the RMCC's 2004 special use application. In its 2004 special use application, the RMCC sought to expand its facilities from about 116,000 square feet to 240,800 square feet. The Church later modified its application to eliminate a proposed 12,000 square feet balcony addition to its sanctuary, reducing its request for additional seating from 1,000 to 150, and by eliminating a proposed 8,000 square feet basement addition. The Church deleted also its request to increase the population of its school from 380 students to 540 students and modified other requests concerning parking, lighting, and a buffer zone on the western side of its property. The BOCC denied most, but not all, of the RMCC's Special Use Application.

Based on the jury's verdicts in favor of the RMCC on three of the RMCC's claims under the RLUIPA, the RMCC now seeks a permanent injunction requiring the BOCC to approve the RMCC's 2004 special use application within 30 days, enjoining the BOCC

from prohibiting the construction of the religious facilities described in the RMCC's 2004 special use application, and enjoining the BOCC from imposing any further substantial burden on the RMCC's religious exercise.

III. STANDARD OF REVIEW & ANALYSIS

A party may obtain a permanent injunction if it proves: A) actual success on the merits; B) irreparable harm unless the injunction is issued; C) the threatened injury outweighs the harm that the injunction may cause the opposing party; and D) the injunction, if issued, will not adversely affect the public interest. *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir.2003); ***See also*** *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir.2007). The RMCC has established each of these elements.

A. Success on the Merits

Again, the jury found in favor of the RMCC on its claims based on RLUIPA's equal terms, substantial burden, and unreasonable limitations provisions. I have resolved the BOCC's claimed affirmative defenses, which presented issues of law, in favor of RMCC. I have concluded that the evidence presented at trial was sufficient to sustain the jury's verdicts, and I have resolved the BOCC's contention that RLUIPA's equal terms, substantial burden, and unreasonable limitations provisions are unconstitutional as applied

in this case. I have concluded that these provisions are constitutional as applied in this case. The RMCC has established success on the merits of these three RLUIPA claims.

B. Irreparable Harm

The violation of one's right to the free exercise of religion necessarily constitutes irreparable harm. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973, 1008 (10th Cir.2004). As detailed in my order denying the BOCC's motion for judgment as a matter of law, this case concerns primarily the RMCC's free exercise of religion as its free exercise is affected by the BOCC's land use decisions. The fact that the RMCC's free exercise rights in this case are based on statutory claims under the RLUIPA rather than on constitutional provisions does not alter the irreparable harm analysis. ***See, e.g.,*** *Kikumura v. Hurley,* 242 F.3d 950, 963 (10th Cir.2001) ("courts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *Jolly v. Coughlin,* 76 F.3d 468, 482 (2nd Cir.1996) ("although plaintiff's free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily"). The RMCC has demonstrated irreparable harm.

C. Balance of Harms

The harm suffered by the RMCC, impairment of its statutorily protected right to the free exercise of religion in the context of land use, is substantial. The BOCC argues that the harm it will suffer if the requested injunction is granted outweighs the harm suffered by the RMCC. The BOCC argues that the jury's verdicts demonstrate that the RMCC's special use application violates the Boulder County Land Use Code. As discussed in my **Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law,** which is entered concurrently with this order, I do not agree with this contention. The record in this case does not demonstrate conclusively that the RMCC's special use application violates the land use code. The BOCC argues also that permitting the expansion proposed in the RMCC's special use application will cause the negative impacts predicted by certain witnesses who testified at trial. In fact, some witnesses at trial did testify that they anticipated certain negative impacts if the RMCC is allowed to expand its facilities as proposed in the special use application. Balanced against the RMCC's statutorily protected right to the free exercise of religion, I conclude that the balance of harms weighs in favor of the RMCC.

D. Public Interest

As detailed in my **Order Denying Defendant's Renewed Motion for Judgment as a Matter of**

Law, which is entered concurrently with this order, the RLUIPA is designed to ensure the enforcement of constitutional rights to the free exercise of religion in the land use context. "Vindicating First Amendment freedoms is clearly in the public interest." *Pacific Frontier v. Pleasant Grove City,* 414 F.3d 1221, 1237 (10th Cir.2005) (concerning First Amendment free speech rights). Generally, enforcement of such rights is considered to be in the public interest. The BOCC argues that an injunction that would require it to act contrary to its Land Use Code would not be in the public interest. Again, I disagree with the BOCC's contention that the record in this case demonstrates that the RMCC's special use application violates the applicable Land Use Code. I conclude that granting the injunction requested by the RMCC will not affect the public interest adversely.

E. Scope of Injunction

The BOCC argues also that the injunction sought by the RMCC is overly broad. The BOCC notes that the RMCC seeks an order enjoining the BOCC from imposing any further substantial burden on the RMCC's religious exercise. I agree with the BOCC's contention that "(i)njunctions that broadly order the enjoined party simply to obey the law and not violate the statute are generally impermissible." *N.L.R.B. v. U.S. Postal Service,* 486 F.3d 683, 691 (10th Cir.2007) (Tymkovich, J. concurring and citing cases). To the extent the RMCC seeks such an injunction, its motion for permanent injunction is denied.

The BOCC argues also that not everything the RMCC requested in its special use application is necessary to alleviate an existing substantial burden on its religious exercise. In addition, the BOCC notes that testimony at trial indicated that some of the expansion proposed in the RMCC's special use application was for anticipated future growth. To the extent the expansion anticipates future growth, the BOCC argues, permitting that expansion now is not necessary to alleviate a present burden on the RMCC's free exercise of religion.

I conclude that these arguments do not require that the injunction entered by this court be more narrow than the scope of the expansion proposed by the RMCC in its special use application. Even though some of the expansion proposed by the RMCC may not be needed immediately, a project of the size at issue here requires substantial advance planning. If the RMCC were required to substantiate its specific current needs as those needs arise, then the RMCC would be saddled with the burden of planning its expansion in a piecemeal fashion. Of course, such a requirement would impose a different burden on the RMCC, and likely would cause the RMCC to be treated differently than similar secular institutions. In the context of the RLUIPA's requirements concerning land use decisions affecting religious institutions, and the practical realities of planning the expansion of physical facilities of the type proposed by the RMCC, I conclude that an injunction requiring the

approval of the RMCC's 2004 special use application is not overly broad.

F. Conclusion

In sum, the RMCC has demonstrated A) actual success on the merits; B) irreparable harm unless the injunction is issued; C) that the threatened injury outweighs the harm that the injunction may cause the opposing party; and D) that the injunction, if issued, will not adversely affect the public interest. Further, based on the record in this case, I conclude that an injunction requiring the approval of the RMCC's 2004 special use application is not overly broad. However, an injunction prohibiting the BOCC from imposing any further substantial burden on the RMCC's religious exercise would not be proper.

IV. RELATED ISSUES

In its first, second, and third claims for relief, as stated in the RMCC's **Amended Complaint and Jury Demand** [# 25], filed May 12, 2006, the RMCC seeks relief under Colorado Rules of Civil Procedure 57 and 106(a)(4). In its claims under Rule 106(a)(4), the RMCC seeks an order declaring that the BOCC exceeded its jurisdiction and abused its discretion in denying the RMCC's special use application. In its Rule 57 claim, the RMCC seeks a declaration that the regulations governing the BOCC's review of the RMCC's special use application are "an impermissible delegation of legislative authority and may not be

enforced against the Church" to deny its special use application.

In view of my conclusion that the RMCC is entitled to a permanent injunction requiring the BOCC to grant the RMCC's special use application, I deny the RMCC's claims under C.R.C.P. 57 and 106(a)(4) as moot. Ultimately, the relief the RMCC might obtain if it succeeded on these claims is, essentially, the same as the relief it already has obtained in this case.

V. ORDERS

THEREFORE, IT IS ORDERED as follows:

1. That based on the jury's verdicts in this case, **JUDGMENT SHALL ENTER** in favor of the plaintiff, the Rocky Mountain Christian Church, and against the defendant, the Board of County Commissioners of Boulder County, Colorado, on the plaintiff's claims under a) 42 U.S.C. § 2000cc(b)(1), the equal terms provision of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-2000cc-5; b) 42 U.S.C. § 2000cc(a), the substantial burden provision of the RLUIPA; and c) 42 U.S.C. § 2000cc(b)(3)(B), the unreasonable limitations provision of the RLUIPA;

2. That based on the jury's verdicts in this case, **JUDGMENT SHALL ENTER** in favor of the defendant, the Board of County Commissioners of Boulder County, Colorado, and against the plaintiff,

the Rocky Mountain Christian Church, on the plaintiff's claims under a) 42 U.S.C. § 2000cc(b)(2), the religious discrimination provision of the RLUIPA; b) the First Amendment of the United States Constitution and Article II, Section 4 of the Constitution of the State of Colorado, alleging violation of the plaintiff's right to free exercise of religion; c) the First Amendment of the United States Constitution and Article II, Section 4 of the Constitution of the State of Colorado, alleging violation of the plaintiff's right to free speech; and d) the First Amendment of the United States Constitution and Article II, Section 4 of the Constitution of the State of Colorado, alleging violation of the plaintiff's right to freedom of association;

3. That the plaintiff's claims under Colorado Rules of Civil Procedure 57 and 106(a)(4) are **DISMISSED** as moot,

4. That the **Plaintiff's Motion for Permanent Injunction** [# 270], filed November 25, 2008, is **GRANTED** in part;

5. That the defendant, the Board of County Commissioners of Boulder County, Colorado, is **PERMANENTLY ENJOINED** and **ORDERED** to approve the special use application of the plaintiff, the Rocky Mountain Christian Church, identified in the records of the defendant as Docket # SU-04-008, within 45 days of the date of this order;

6. That the **Plaintiff's Motion for Permanent Injunction** [# 270], filed November 25, 2008, otherwise is **DENIED**;

7. That the plaintiff is **AWARDED** its costs to be taxed by the Clerk of the Court pursuant to Fed.R.Civ.P. 54(d)(1) and D.C.COLO.LCivR. 54.1; and

8. That any motion seeking an award of attorney fees as part of the costs to be awarded in this case **SHALL BE FILED** on or before **May 11, 2009,** and the filing of any response and reply shall be marshaled as required by D.C.COLO.LCivR 7.1.C.

---

612 F.Supp.2d 1163

United States District Court,
D. Colorado.
ROCKY MOUNTAIN CHRISTIAN CHURCH,
Plaintiff,
and
United States of America, Intervenor Plaintiff,
v.
BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, Colorado, Defendant.
Civil No. 06-cv-00554-REB-BNB.

March 30, 2009.

Amy L. Nafziger, Darrell Gene Waas, J. Thomas Macdonald, Thomas J. Ragonetti, Kathryn Irene Hopping, Otten, Johnson, Robinson, Neff & Ragonetti, P.C., Denver, CO, for Plaintiff.

Peter Michael Bryce, Varu Chilakamarri, U.S. Department of Justice, Washington, DC, for Intervenor Plaintiff.

Dwight H. Merriam, Robinson & Cole, LLP, Hartford, CT, Hiram Bissell Carey, III, John R. Bauer, Michael Steven Giaimo, Robinson & Cole, LLP, Boston, MA, David Evan Hughes, Patricia A. Mayne, Boulder County District Attorney's Office, Boulder, CO, for Defendant.

ORDER DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

BLACKBURN, District Judge.

This matter is before me on the **Defendant's Renewed Motion for Judgment as a Matter of Law** [# 279].[1] filed January 5, 2009. Both the plaintiff and the intervenor plaintiff filed responses [# 286 & # 293] and the defendant filed replies [# 290 & # 298]. I deny the motion.

I. STANDARD OF REVIEW

Under Rule 50, a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." FED. R. CIV. P. 50(a)(1). When reviewing a motion under Rule 50(a), I must review the record "taken as a whole" and I "must draw all reasonable inferences in favor of the nonmoving party. . . ." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). I may not make credibility determinations or weigh the evidence. *Id.* Further, I must "give credence to the evidence favoring the nonmovant as well as

---

[1] "[# 279]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's electronic case filing and management system (CM/ECF). I use this convention throughout this order.

that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.* (internal quotation omitted). In short, the "standard for granting summary judgment mirrors the standard for judgment as a matter of law, such that the inquiry under each is the same." *Id.* (internal quotations omitted).

II. BACKGROUND

This case was tried to a jury from November 3 to November 19, 2008. At the conclusion of the trial, the jury returned verdicts in favor of the plaintiff, Rocky Mountain Christian Church (RMCC), on three claims under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-2000cc-5. Specifically, the jury found for the RMCC on the RMCC's claims under (1) RLUIPA's equal terms provision, § 2000cc(b)(1); (2) RLUIPA's substantial burden provision, § 2000cc(a); and (3) RLUIPA's unreasonable limitations provision, § 2000cc(b)(3)(B). The jury found in favor of the defendant on all other claims, including the RMCC's constitutional and RLUIPA claims alleging that the defendant, the Board of County Commissioners of Boulder County, Colorado (BOCC), had discriminated against the RMCC on the basis of religion.

At the close of the evidence, I deferred ruling on the BOCC's motion for judgment as a matter of law, as permitted under FED. R. CIV. P. 50(b), and

ultimately directed the BOCC to file its motion in writing, which it has done. In its present motion, the BOCC re-asserts its motion for judgment as a matter of law as to the three RLUIPA claims on which the jury found in favor of the RMCC. The BOCC argues that the RMCC failed to present sufficient evidence at trial to support any of the three RLUIPA claims on which the jury found in favor of the RMCC. In addition, the BOCC argues that the three RLUIPA sections on which the RMCC's successful claims are based are unconstitutional as applied in this case. I address first the BOCC's arguments that the evidence was not sufficient to sustain the jury's finding in favor of the RMCC on the three RLUIPA sections cited above. *See, e.g., Jean v. Nelson,* 472 U.S. 846, 854, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) (prior to reaching constitutional questions, federal courts first must consider nonconstitutional grounds for decision).

I note that the BOCC has addressed its asserted affirmative defenses in its response to the RMCC's motion for permanent injunction [# 270]. To ensure a comprehensive analysis of the claims on which the BOCC claims it is entitled to judgment as a matter of law, I address the BOCC's affirmative defenses in this order. I address the RMCC's motion for permanent injunction in a separate order.

III. SUFFICIENCY OF THE EVIDENCE

A. Equal Terms – § 2000cc(b)(1)

The equal terms provision of RLUPIA provides:

> No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

42 U.S.C. § 2000cc(b)(1). The BOCC argues that the evidence presented at trial was not sufficient to sustain the jury's verdict in favor of the RMCC on the RMCC's claim under this subsection. I disagree.

The RMCC's claims in this case are based on the BOCC's partial denial of the RMCC's 2004 Special Use Application. In its 2004 special use application, the RMCC sought to expand its facilities from 116,000 square feet to 240,800 square feet. The Church later modified its application to eliminate a proposed 12,000 square feet balcony addition to its sanctuary, reducing its request for additional seating from 1,000 to 150, and by eliminating a proposed 8,000 square feet basement addition. The Church deleted also its request to increase the population of its school from 380 students to 540 students and modified other requests concerning parking, lighting, and a buffer zone on the western side of its property. The BOCC denied most, but not all, of the RMCC's Special Use Application. Hereafter, I will refer to the BOCC's decision on the RMCC's 2004 special use application as the denial of the application.

> A plaintiff bringing an as-applied Equal Terms challenge must present evidence that a similarly situated nonreligious comparator received differential treatment under the challenged regulation. If a plaintiff offers no similarly situated comparator, then there can be no cognizable evidence of less than equal treatment, and the plaintiff has failed to meet its initial burden of proof.

Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295, 1311 (11th Cir.2006). The BOCC argues that the RMCC did not establish a sufficient evidentiary basis for a reasonable jury to conclude that the RMCC was treated on less than equal terms as compared to the Dawson School, the one similarly situated secular comparator advanced by the RMCC. The BOCC argues that the Dawson School is similarly situated to the RMCC, for the purpose of the equal terms claim, only if the evidence demonstrates that the special use applications of both entities have the same effect on the purposes or objectives of the special use criteria in the Boulder Land Use Code. The Land Use Code is the primary source of the land use regulations applied in this case, although there are other relevant sources that were discussed at trail.

The BOCC notes that the BOCC's denial of the RMCC's 2004 special use application hinged on the application of three criteria. The BOCC concluded that the RMCC's proposal 1) was not in harmony with the character of the neighborhood and was not

compatible with the surrounding area; 2) was not in accordance with the Comprehensive plan because it constituted intensive development on rural land, and on agricultural lands of national importance; and 3) would result in an over-intensive use of land and excessive depletion of natural resources, namely agricultural lands. *Defendant's Motion for Summary Judgment* [# 113], filed June 20, 2007, Exhibit N (BOCC Resolution 2006-23) (this exhibit also was admitted at trial). The BOCC contends that the evidence at trial showed that the special use application of the Dawson School differed from the RMCC application in several respects:

> 1) The RMCC proposed to expand its facilities by about 124,000 square feet and to add over 500 parking spaces, while the Dawson school proposed to add about 72,600 square feet and relatively few parking spaces.
>
> 2) The RMCC proposed a massive complex of large connected buildings, totaling about 240,000 square feet, while the Dawson School proposed multiple small buildings.
>
> 3) The visual impact of RMCC's proposed development would be greater than the existing visual impact of the expansion of the Dawson School, which was approved in 1996.
>
> 4) The traffic that would be generated by RMCC, if it were permitted to build everything proposed in its 2004 application, would be ten times greater than the traffic generated by the Dawson School.

5) The BOCC notes that the RMCC is in an area known as the Niwot buffer zone, and the Dawson School is not in the Niwot buffer zone.

In response, the RMCC argues that the evidence at trial showed that both the RMCC and the Dawson School are both in the agricultural zone district in the plains planning area of the Boulder County Comprehensive Plan. They both are outside of any designated community service area, and they both sought approval to expand an existing facility under Section 4-601 of the code. The size of the RMCC parcel and the Dawson School parcel were comparable, and the size of the facilities proposed by RMCC and the Dawson School were comparable. Rosie Koopmann, the plaintiff's expert witness, testified that both parcels were on lands designated as agricultural lands of national importance, both RMCC and the Dawson School sought approval for a double gymnasium of about the same size, and approval of significant classroom space. Further, Koopmann testified that the areas and neighborhoods surrounding the two facilities were comparable.

When the Dawson School's special use application was granted, it was permitted to expand its facilities to about 196,000 square feet, including a 30,000 square feet double gymnasium, a 20,000 square foot elementary school, and 11,000 square feet of classrooms. In contrast, the RMCC was denied its proposed double gymnasium and its proposed educational wing. Currently, RMCC's approved buildings include 116,000 square feet. After the RMCC modified

its special use application, the RMCC sought to expand its facilities to about 220,000 square feet.

Generally, I conclude that the evidence presented at trial is amply sufficient to permit a reasonable finder of fact to conclude that the RMCC and the Dawson School were comparable for the purpose of applying RLUIPA's less than equal terms provision, 42 U.S.C. § 2000cc(b)(1). Some of the differences noted by the BOCC are minimized in importance because those differences do not appear to have played a direct role in the BOCC's challenged decision. With regard to traffic, I note that the BOCC's decision does not note the special use criteria concerning traffic as a basis for the decision, although it does note the number of proposed parking spaces and the fact that the RMCC draws people within a 7 mile radius. BOCC Resolution 2006-23, p. 5. Similarly, there is no regulatory provision noted by the BOCC that prefers multiple buildings to one large building. Finally, there was sufficient evidence at trial to support a reasonable conclusion that the visual impact of the RMCC facility, after the proposed expansion, would be similar to or less than the visual impact of the current RMCC facility. The evidence presented at trial provides a sufficient evidentiary basis for a reasonable jury to conclude that the Dawson School was similarly situated to the RMCC for the purpose of the RMCC's equal terms claim and for a reasonable jury to find in favor of the RMCC on this claim.

In its response to the **Plaintiff's Motion for Permanent Injunction** [# 270], filed November 25, 2008, the BOCC argues that the verdict for the RMCC on the RLUIPA equal terms claim cannot stand because the BOCC's denial of the RMCC's 2004 special use application was rationally related to a legitimate governmental interest. This is the standard applicable when a law that is both neutral and generally applicable is claimed to impose a burden on a person's exercise of religion. In that context, the law need only be rationally related to a legitimate governmental interest to survive a free exercise challenge. *Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643, 649 (10th Cir.2006) (quotations and citations omitted). For reasons outlined in greater detail below, I conclude that the jury's verdict in this case demonstrates that the BOCC's decision was not an application of a law that is both neutral and generally applicable. Therefore, the rationally related to a legitimate governmental interest defense is not applicable to the RLUIPA equal terms claim.

B. Substantial Burden – § 2000cc(a)

The substantial burden provision of RLUPIA provides, in relevant part:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the

> burden on that person, assembly, or institution –
>
> > (A) is in furtherance of a compelling governmental interest; and
> >
> > (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a).

1. Evidence of Substantial Burden on Religious Exercise

As the BOCC notes, the evidence at trial demonstrated that the RMCC has continued to engage in all aspects of its religious exercise after the BOCC's decision to deny partially the RMCC's 2004 special use application. The BOCC argues that limiting the scale of the RMCC's activities at its Boulder County location does not constitute a substantial burden. The RMCC argues that, for the purpose of § 2000cc(a), the denial of a church's expansion proposal can constitute a substantial burden even if religious activity continues at the site. I agree.

Substantial Burden – The term "substantial burden," as used in the RLUIPA, is to be interpreted by reference to the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb through 2000bb-4. *Grace United Methodist Church v. City Of Cheyenne,* 451 F.3d 643, 661 (10th Cir.2006). The RFRA purported to codify the test articulated by the

Supreme Court in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). In *Sherbert,* the Court invalidated a state unemployment compensation rule that conditioned the availability of benefits on an applicant's willingness to work under conditions forbidden by the applicant's religion. Sherbert was a member of the Seventh-day Adventist Church and was discharged by her employer because she would not work on Saturday, which was the Sabbath day of her faith. *Id.* at 399, 83 S.Ct. 1790. State unemployment officials found that Sherbert was not qualified for unemployment benefits because her refusal to accept a job that required her to work on Saturday amounted to a refusal to accept suitable work when offered. *Id.* The Supreme Court ruled that this finding violated Sherbert's free exercise rights:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404, 83 S.Ct. 1790. The Court held that governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. *Id.* at 403, 83 S.Ct. 1790.

In 1990, the Supreme Court decided *Employment Division v. Smith,* 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), in which the Court held that the Free Exercise Clause does not "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" In *Smith,* the plaintiffs' religious use of peyote resulted in their dismissal from their employment. The state of Oregon concluded that the use of peyote was misconduct, and that this basis for dismissal from employment disqualified the plaintiffs from receipt of Oregon unemployment compensation benefits. The *Smith* Court refused to apply the *Sherbert* balancing test. *Smith,* 494 U.S. at 883-84, 110 S.Ct. 1595. The Court noted that *Sherbert* and related cases involved systems of "individualized exemptions" that lent themselves to individualized governmental assessment of the reasons for a person's conduct. *Smith,* 494 U.S. at 884, 110 S.Ct. 1595. The *Smith* Court concluded that *Sherbert* has been confined largely to the context in which it was decided, denial of unemployment compensation, and that the *Sherbert* rule does not apply to neutral laws of general applicability. *Smith,* 494 U.S. at 883-884, 110 S.Ct. 1595.

In response to *Smith,* Congress enacted the RFRA. The RFRA purported to codify the *Sherbert* test and to apply that test to all government acts that "substantially burden" religious exercise, even if the burden results from a rule of general applicability.

City of Boerne v. Flores, 521 U.S. 507, 515, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). In *City of Boerne,* the Supreme Court held that the RFRA was unconstitutional as applied to state and local governments. 521 U.S. at 532-536, 117 S.Ct. 2157. RLUIPA was enacted in response to *City of Boerne* and, again, for the purposes of the RLUIPA, the term "substantial burden" is to be given the broad meaning used in RFRA and in *Sherbert.*

Religious Exercise – The RLUIPA defines "religious exercise" to encompass "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," including "(t)he use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7). This definition is broader than the definition of "religious exercise" used under the RFRA and in constitutional jurisprudence under the First Amendment. Generally, the Supreme Court has limited free exercise claims to religious beliefs or practices that are central or fundamental to a person's religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* 508 U.S. 520, 565, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Grace United Methodist Church v. City Of Cheyenne,* 451 F.3d 643, 662 (10th Cir.2006).

Applying the definition of "substantial burden" and the broad definition of "religious exercise" applicable under RLUIPA, I conclude that the evidence presented at the trial of this case was sufficient to permit a reasonable fact finder to conclude that the land use regulation at issue here imposed a

substantial burden on the religious exercise of the RMCC. As the RMCC notes, the evidence was sufficient to support reasonable conclusions that

> a. Overcrowding has caused the church to move from two longer services on Sunday to three shorter services thereby curtailing time for singing and praise, for weekly communion and personal reflection, and for the blessing of various speakers and missionaries during services.
>
> b. Those attending the first two services can no longer witness public baptisms.
>
> c. The Church has been prevented from holding most wedding ceremonies due to space constraints.
>
> d. The space for funerals is limited and caskets are placed in hallways due to space constraints.
>
> e. The church has no space to hold fellowship events large enough to accommodate the size of its congregation.
>
> f. Time for fellowship between services has been curtailed.
>
> g. Some adult Sunday school classes have been curtailed or eliminated completely and others are limited in size due to lack of space.
>
> h. Some church groups have been forced to stop meeting altogether.

i. The sermon delivered by Pastor Ahlgrim has been shortened from 35 minutes per week to only 25 minutes per week.

j. The Church is prevented from highlighting its missionaries to its congregation.

k. Visiting teachers, ministers, artists, musicians and other speakers and performers cannot minister to the church body.

l. Growth of the Sunday School has curtailed lesson times for the children.

m. Sunday school classes and Christian educational space have reached capacity / lack of additional space limits the ministries that can be pursued and developed.

n. Certain Church programs, such as Women in the Word, adult Sunday School, and Mothers of Preschoolers, cannot accept new participants due to lack of space.

o. Some children's Sunday School classes must be held in hallways due to lack of space.

p. Space constraints inhibit growth and outreach to new members.

The BOCC cites some contrary evidence, but that evidence does not demonstrate that there was no legally sufficient basis for the jury in this case to conclude that the BOCC's decision imposed a substantial burden on the RMCC's exercise of religion.

2. Jurisdictional Hooks

The BOCC argues that the jury's verdict in this case now mandates the conclusion that the RMCC's substantial burden claim does not satisfy the so-called "jurisdictional hooks" provided in § 2000cc(a)(2), which provides alternative jurisdictional bases for a substantial burden claim under RLUIPA. Section 2000cc(a)(2) provides:

> This subsection applies in any case in which –
>
> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
>
> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

Previously, I concluded that the RMCC's substantial burden claim satisfied the interstate commerce jurisdictional hook provided in § 2000cc(a)(2)(B). *Order Concerning Defendant's Motion for Summary*

Judgment [# 168], filed March 31, 2008, p. 15. This jurisdictional hook is satisfied if the alleged substantial burden in question affects, or removal of that substantial burden would affect, interstate commerce. As I noted previously, the RMCC's 2004 Special Use Application concerns a construction project that would cost tens of millions of dollars. The RMCC challenges the county's denial of parts of the Special Use Application that form a significant portion of the construction project proposed in the application. In my summary judgment order, I concluded that the undisputed facts in the record demonstrated that the RMCC's claim falls within the interstate commerce jurisdictional hook of § 2000cc(a)(2)(B).

In its present motion, the BOCC notes that the jury did not award RMCC any damages based on the BOCC's partial denial of the RMCC's special use application. The BOCC argues that this determination by the jury supports a reasonable inference that the jury concluded that the RMCC will not actually build the expansion it proposed in its special use application. If the RMCC will not actually build the expansion, then the denial of the special use application will not affect interstate commerce. I disagree that the suggested inference is proper or required. As RMCC notes, the lack of a damages award may be based on a conclusion by the jury that damages are too speculative. In this circumstance, almost no inference is safe. However, it is reasonable to conclude, based on the evidence presented at trial and after the jury's verdict, that it is more likely than not

that the RMCC will build at least some significant portion of the construction project proposed in its special use application. That alone is sufficient to support the conclusion that removal of the substantial burden would affect commerce among the several states. Even if the RMCC builds only ten percent of the proposed project, the construction project would affect interstate commerce.

As I discuss in Section IV.B.3, below, I conclude also that, considering the RMCC's allegations and the jury's verdicts in this case, the jurisdictional hook stated in § 2000cc(a)(2)(C) also is satisfied in this case.

3. BOCC's Affirmative Defense – Strict Scrutiny

The substantial burden provision of the RLUIPA includes an affirmative defense that has been asserted by the BOCC. 42 U.S.C. § 2000cc(a) provides that no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a religious assembly or institution "unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." This affirmative defense requires a determination of whether the interest asserted by the BOCC is a compelling governmental

interest. That determination is a question of law that must be resolved by the court. *U.S. v. Hardman,* 297 F.3d 1116, 1127 (10th Cir.2002). Thus, following the trial, resolution of this affirmative defense is now ripe for my determination.

The affirmative defense codified at § 2000cc(a) replicates the strict scrutiny standard of constitutional law. *See, e.g., U.S. v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). As the United States Supreme Court has noted aptly, "strict scrutiny leaves few survivors." *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 455, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). The BOCC argues that the evidence presented at trial demonstrates that the BOCC's denial of the RMCC's special use application was in furtherance of a compelling governmental interest and was the least restrictive means of furthering that interest.[2] I disagree.

A compelling governmental interest is an interest of the highest order. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

> There is, however, little guidance from the Supreme Court in determining what qualifies as a compelling interest. In *Wisconsin v. Yoder*, the Court defined a compelling

---

[2] The BOCC addresses this issue in its response [# 284] to the RMCC's motion for permanent injunction [# 270].

> interest as "only those interests of the highest order." 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("[O]nly those interests of the highest order and not otherwise served can overbalance legitimate claims to the free exercise of religion."). In *Sherbert v. Verner,* the Court stated that "[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation." 374 U.S. 398, 406, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (*quoting Thomas v. Collins,* 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945)).

U.S. v. Hardman, 297 F.3d 1116, 1127 (10th Cir.2002). To establish a compelling governmental interest in the context of § 2000cc(a), the BOCC must demonstrate that a compelling governmental interest is at stake in this particular case, rather than relying on a compelling interest in general. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 430, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (applying RFRA); *Westchester Day School v. Village of Mamaroneck,* 504 F.3d 338, 353 (2nd Cir.2007) (applying RLUIPA, citing *Gonzales,* 546 U.S. 418, 126 S.Ct. 1211 (2006)).

The BOCC argues that the interests served by the Boulder County Land Use Code and the Boulder County Comprehensive Plan are compelling governmental interests. The BOCC cites cases in which courts have concluded that land use and the enforcement of zoning regulations are compelling governmental interests. However, the BOCC does not cite any evidence from the trial in this case, and I do not

recall any such evidence being presented at trial, that shows that the particular issues presented by the RMCC's special use application implicated compelling governmental interests. Again, the primary reasons cited by the BOCC in its resolution denying the RMCC's special use application were lack of harmony with the character of the neighborhood, incompatibility with the surrounding area, incompatibility with the county's comprehensive plan, which limits intensive development on rural land, incompatibility with the designation of the RMCC's land as agricultural lands of national importance, and over-intensive use of land or excessive depletion of natural resources.

In the context of a strict scrutiny analysis, such interests generally have been found not to be compelling. *Dimmitt v. City of Clearwater,* 985 F.2d 1565, 1570 (11th Cir.1993) (deleterious effect of graphic communication on visual aesthetics and traffic safety not a compelling state interest of the sort required to justify content based regulation of noncommercial speech); *Midwest Media Property, L.L.C. v. Symmes Tp., Ohio,* 503 F.3d 456, 477 (2007) (aesthetic and safety concerns insufficient to satisfy strict scrutiny; citing *Dimmitt*); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida,* 493 F.2d 799, 808 (5th Cir.1974) (consistency with master plan not compelling governmental interest). In the present case, I conclude that the interests asserted by the BOCC to justify its denial of the RMCC's special use application, although legitimate

in many senses, do not constitute compelling governmental interests.

I note further that the jury's finding that the RMCC was treated on less than equal terms with the Dawson School also plays a role in the compelling interest analysis.

> Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546-547, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). It is important to note that the jury found in favor of the BOCC on both of the plaintiff's claims alleging that the BOCC discriminated against the RMCC because the RMCC is a church or is a religious institution. However, addressing the RMCC's RLUIPA equal terms claim, the jury found that the BOCC treated the RMCC on less than equal terms than the Dawson School. In general, similar interests were at stake in the Dawson School's special use application and the RMCC's special use application. The fact that the Dawson School received more

favorable treatment in this context tends to show that the interests asserted by the BOCC are not interests of the highest order.

Addressing the least restrictive means aspect of the BOCC's strict scrutiny affirmative defense, the RMCC argues that the BOCC did not present at trial evidence that demonstrates that the BOCC used the least restrictive means to serve the BOCC's claimed compelling interest when the BOCC denied most of the RMCC's special use application. To satisfy its burden on this issue, the BOCC must show that it considered and rejected less restrictive measures because the less restrictive measures were not effective to serve the compelling interest at issue. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). The BOCC argues that the evidence at trial showed that the BOCC has approved all of the RMCC's special use applications, other than the 2004 application, and has permitted the RMCC's use of its property to the extent that the RMCC now operates the largest church in Boulder County. Further, the BOCC notes that it made a concerted effort to accommodate the RMCC's religious practice while still complying with the Land Use Code. The RMCC argues that the record in this case does not show that the BOCC considered whether approval of some additional elements of the RMCC's special use application might serve to accommodate the RMCC's religious exercise while further minimizing the burden imposed by the Land Use Code

without impairing significantly the interests served by the code.

I find and conclude that the record in this case does not include evidence that the BOCC considered alternatives in a way that shows that the BOCC focused on finding the least restrictive means of serving its asserted interests while minimizing to the greatest extent possible the burden imposed on the RMCC's religious exercise. Further, the evidence in the record does not demonstrate that the BOCC's partial denial of the RMCC's special use application was the least restrictive means of serving the BOCC's asserted interests.

4. Conclusion

In sum, I conclude that the evidence presented at trial is sufficient to support the jury's verdict finding that the BOCC imposed a substantial burden on the RMCC's exercise of religion, as those terms are used in the RLUIPA. Further, I conclude that the evidence and the jury's verdict demonstrate that the BOCC's challenged decision readily falls within the interstate commerce "jurisdictional hook" of § 2000cc(a)(2). Finally, I conclude that the evidence presented at trial is not sufficient to establish the strict scrutiny affirmative defense of § 2000cc(a).

C. Unreasonable Limitations – § 2000cc(b)(3)(B)

The unreasonable limitations provision of RLUIPA, codified at § 2000cc(b)(3)(B), provides, in relevant part: "No government shall impose or implement a land use regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." The BOCC argues that the evidence presented at trial is not sufficient to support the jury's verdict on this claim because, according to the BOCC, the RMCC presented no more than a scintilla of evidence that the Commissioners' application of the Special Use criteria set forth in the Boulder Land Use Code unreasonably limits religious assemblies, institutions, or structures within the county. Because this portion of the RLUIPA refers to religious assemblies, institutions, or structures using plural rather than singular nouns, the jury in this case was instructed that it could find that a land use regulation

> "unreasonably limits" if the regulation, as applied or implemented, has the effect of depriving both the Rocky Mountain Christian Church and other religious institutions or assemblies of reasonable opportunities to practice their religion, including the use and construction of structures, within Boulder County.

Jury Instruction No. 12.

At trial, Rosi Koopman was qualified as an expert witness for the RMCC on the subject of planning and development. Koopman testified that she

had worked for the Boulder County land use department for 12 years and that after leaving the county's employ, she had worked with several Boulder County churches, including RMCC, as a consultant concerning their efforts to negotiate the county's special use permit process. Asked if she had formed an opinion about the extent of the difficulties faced by a religious organization in obtaining land use approval in Boulder County, Koopman said she had formed an opinion. She opined that the county's regulations had become more difficult over the years, and that any church of any size must go through either a site plan review or a special use review. During her testimony she described various difficulties and limitations faced by various Boulder County churches with which she had worked as a consultant on the churches' special use permits. On cross examination Koopman agreed that anyone in Boulder County who applies for permission to do something on their property faces the same regulations and limitations. She agreed also that she was not aware of any special use application by a church, other than RMCC, that had not been approved by the county. She testified also that it is common for a church to have conditions placed on their special use applications that reduce either the number of people permitted or the number of square feet permitted in a facility.

Applying the plain language of this portion of RLUPIA and the jury instruction quoted above, I conclude that the evidence was sufficient to support a reasonable conclusion by the jury that churches other

than RMCC faced land use regulations in Boulder County that unreasonably limited the opportunity of those churches to practice their religion.

D. Conclusion

Applying the standard of review applicable under FED. R. CIV. P. 50, as detailed above, I find and conclude that the evidence presented in the trial of this case is sufficient for a reasonable jury to find in favor of the RMCC on its claims under (1) RLUIPA's equal terms provision, § 2000cc(b)(1); (2) RLUIPA's substantial burden provision, § 2000cc(a); and (3) RLUIPA's unreasonable limitations provision, § 2000cc(b)(3)(B).

IV. CONSTITUTIONALITY – AS APPLIED CHALLENGE

The BOCC argues that the RLUIPA is unconstitutional both facially and as applied. The BOCC asserted its facial challenge in its motion to dismiss [# 34], filed June 30, 2006. I declined to address and resolve the facial challenge pretrial because it was possible that the jury would find in favor of the BOCC on the RLUIPA claims. In that circumstance, there would be no need to address the constitutional challenge. Of course, the jury now has found against the BOCC on three of the RMCC's RLUIPA claims. In its present motion for judgment as a matter of law, the BOCC argues its as applied challenge, addressing the three RLUIPA claims on which the jury found in favor

of the RMCC. Addressing the BOCC's as applied challenge, I conclude that the three RLUIPA sections on which the jury found in favor of the RMCC are constitutional as applied in this case.

Because I conclude that these RLUIPA sections are constitutional as applied in this case, I do not address the BOCC's facial challenge. A facial challenge is based on the assertion "that no set of circumstances exists under which the [RLUIPA] would be valid." *U.S. v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Of course, my conclusion that the RLUIPA is constitutional as applied in this case necessarily refutes the contention that the RLUIPA is unconstitutional in all conceivable circumstances.

> In conventional constitutional litigation, it rarely (if ever) will be the case that a court, having upheld the constitutionality of a law in the context of the as – applied challenge before it, will proceed to strike the law in all of its applications based on hypothetical applications of the law to hypothetical individuals not before the court.

Connection Distributing Co. v. Holder 557 F.3d 321, 335 (6th Cir.2009).

A. Establishment Clause

The BOCC argues that the equal terms, substantial burden, and unreasonable limitations provisions

of RLUIPA, as applied in this case, violate the Establishment Clause of the First Amendment. The BOCC asserts that these RLUIPA provisions grant extraordinary privileges to RMCC which permit the RMCC to avoid the neutral and generally applicable criteria of the Boulder County Land Use Code solely because the RMCC is religious. As applied in this case, the BOCC contends, these RLUIPA provisions require the BOCC to violate the constitutionally mandated neutrality between religion and non religion.

Establishment Clause challenges are reviewed under the three part test established in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Although the *Lemon* test often has been criticized, the Tenth Circuit recently reiterated that the *Lemon* test is the controlling law. *Weinbaum v. City of Las Cruces,* 541 F.3d 1017, 1030 n. 14 (10th Cir.2008). Under *Lemon,* a governmental action does not violate the Establishment Clause if (1) the action has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion. *Lemon,* 403 U.S. at 612-613, 91 S.Ct. 2105. "State action violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard,* 482 U.S. 578, 583, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). The Tenth Circuit interprets the purpose and effect prongs of the *Lemon* test in light of Justice O'Connor's endorsement test, stated in *Lynch v. Donnelly,* 465 U.S. 668, 687-694, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J.,

concurring). *Weinbaum,* 541 F.3d at 1030. The endorsement test asks whether a "reasonable observer, reasonably informed as to the relevant circumstances, would perceive the government to be acting neutrally." *Mission v. Salt Lake City Corp.,* 425 F.3d 1249, 1260 (10th Cir.2005) (quotations omitted). Applying the *Lemon* test, I conclude that the equal terms, substantial burden, and unreasonable limitations provisions of RLUIPA, as applied in this case, do not violate the Establishment Clause.

1. Purpose

In deciding whether the government's purpose for a particular legislative enactment is improper under the Establishment Clause, a court must determine the purpose of the legislation by examining the purpose "through the eyes of an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute. . . ." *Weinbaum,* 541 F.3d at 1031. A legislative enactment whose purpose is to "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions" does not violate the legislative purpose prong of *Lemon. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 335, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987). A court should not lightly attribute unconstitutional motives to the government, particularly when a plausible secular

purpose can be discerned. *Weinbaum,* 541 F.3d at 1032.

Courts that have examined RLUIPA's land use provisions generally have concluded that these provisions have a secular purpose: to lift government-created burdens on private religious exercise. *See, e.g., Westchester Day School v. Village of Mamaroneck,* 504 F.3d 338, 355 (2nd Cir.2007) (examining substantial burden provision); *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1240-1241 (11th Cir.2004) (equal terms provision). In *Cutter v. Wilkinson*, the Supreme Court concluded that the institutionalized persons provisions of RLUIPA had the purpose of alleviating "exceptional government-created burdens on private religious exercise," and concluded that those provisions do not violate the Establishment Clause. 544 U.S. 709, 720, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). The land use provisions of RLUIPA carry the same purpose, and that purpose is proper under the legislative purpose prong of *Lemon*.

2. Principal or Primary Effect

The effect prong of the *Lemon* test "looks through the eyes of an objective observer who is aware of the purpose, context, and history" of the legislation in question. *Weinbaum,* 541 F.3d at 1031. To satisfy *Lemon,* the law must have a principal or primary effect that neither advances nor inhibits religion. *Amos,* 483 U.S. at 336, 107 S.Ct. 2862. The fact that

religious organizations are better able to advance their purposes because of the law in question does not mean necessarily that the law violates the Establishment Clause. *Id.* at 336-337, 107 S.Ct. 2862. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." *Id.* at 337, 107 S.Ct. 2862. On this rationale, property tax exemptions for churches and exemption from the employment discrimination strictures of Title VII have been upheld when facing Establishment Clause challenges. *Walz v. Tax Comm'n,* 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (property tax exemption); *Amos,* 483 U.S. 327, 107 S.Ct. 2862 (Title VII exemption). On the other hand, a law produces effects forbidden by the Establishment Clause if "the government itself has advanced religion through its own activities and influence." *Amos,* 483 U.S. at 337, 107 S.Ct. 2862. The Establishment Clause prohibits government sponsorship of religion, financial support for religion, and the active involvement of the sovereign in religious activity. *Id.*

The BOCC argues that the RLUIPA land use provisions, as applied in this case, effectively mandate preferential treatment of a religious entity over secular entities based solely on religion, and, thus, those provisions convey a message of government approval or endorsement of religion, in violation of the Establishment Clause. The BOCC contends that the jury's verdict requires the BOCC to reverse its nondiscriminatory partial denial of the RMCC's special use application; thus, requiring the BOCC to

give extraordinary benefits to the RMCC based solely on the fact that the RMCC is religious.

The BOCC's argument is based on its contention that the jury's verdict demonstrates that the jury found that the RMCC's special use application violated the requirements of the Land Use Code. The BOCC notes that the jury rejected both of RMCC's claims alleging discrimination based on religion. If the jury rejected the theory of religious discrimination, the BOCC contends, then the jury must have concluded that the BOCC rejected the RMCC's 2004 special use application for the reasons stated by the BOCC; that is, because the RMCC's proposed uses did not comply with the Land Use Code and its special use criteria. If the jury's verdict establishes that the RMCC's special use application was denied because it did not comply with the Land Use Code, then the jury's verdict under RLUIPA will require the BOCC to exempt the RMCC from the code because the RMCC is religious.

The limits of the protections afforded to a church under the Free Exercise Clause are implicated in the BOCC's analysis. Not every regulation of religious conduct is subject to a free exercise challenge. In fact, many regulations that affect religious conduct are not subject to a free exercise challenge.

> (T)he free exercise clause does not prohibit Congress and local governments from validly regulating religious conduct. Neutral rules of general applicability normally do not raise

> free exercise concerns even if they incidentally burden a particular religious practice or belief. Thus a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional [free exercise] challenge.

Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649 (10th Cir.2006) (quotations and citations omitted).

> (T)he defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (*e.g.*, a law excluding members of a certain sect from public benefits . . .); whereas, the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment. . . .

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 557, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (Scalia, J., concurring) (citations omitted; emphasis in original). Generally, "land use regulations, i.e., zoning ordinances, are neutral and generally applicable notwithstanding that they may have individualized procedures for obtaining special use permits or variances." *Grace United Methodist Church,* 451 F.3d at 651 (internal quotation omitted). Facially, the Boulder County Land Use Code and its

special use criteria are neutral and generally applicable. The BOCC argues that the RLUIPA violates the Establishment Clause because the RLUIPA, as applied in this case, gives the RMCC an exemption from these otherwise permissible land use regulations.

The BOCC's analysis ignores a key aspect of the jury's verdict in this case. The jury found in favor of the RMCC on the RMCC's equal terms claim, concluding that the BOCC had imposed or implemented a land use regulation in a manner that treats the RMCC, a religious institution, on less than equal terms with a nonreligious assembly or institution, the Dawson School. Much of the BOCC's Establishment Clause argument is based on the contention that the RLUIPA, as applied in this case, requires the BOCC to favor religion rather than maintaining neutrality toward religion. However, the jury's equal terms verdict necessarily is based on the conclusion that the BOCC treated the RMCC on less favorable terms than a similarly situated secular comparator. Although the jury did not attribute a bias against religion to the BOCC, this unequal treatment of the RMCC is prohibited by the RLUIPA no matter what the underlying motive may be. Further, an objective observer who is aware of the purpose, context, and history of the RLUIPA could not conclude that the Act's equal treatment requirement causes the government itself to advance religion through its own activities and influence.

In the context of this case, the jury's verdicts in favor of the RMCC on its substantial burden and

unreasonable limitations claims also readily satisfy the primary effect prong of the *Lemon* test. First, the jury's finding of unequal treatment may well have informed its findings that the BOCC also had imposed a substantial burden and unreasonable limitations on the RMCC. If the equal treatment requirement is the lynchpin of the jury's verdicts, then an objective observer could not conclude that the RLUIPA, as applied in this case, causes the government itself to advance religion through its own activities and influence Second, even if the finding of unequal treatment did not inform the jury's verdicts on the substantial burden and unreasonable limitations claims, an objective observer who is aware of the purpose, context, and history of the RLUIPA could not conclude that the Act's substantial burden and unreasonable limitations provisions cause the government itself to advance religion through its own activities and influence. To the extent the jury's verdicts on these two claims may require the BOCC to relax regulations that otherwise might properly be enforced against the church, such a requirement does not cause government itself to advance religion through its own activities and influence. Like the property tax and Title VII exemptions noted above, an exemption from land use regulation that might be read into the jury's verdicts in this case cannot reasonably be seen, under applicable law, as government advancement of religion.

3. Excessive Government Entanglement with Religion

The excessive entanglement prong of the *Lemon* test is related closely to the effect prong. Addressing the entanglement prong of *Lemon*, the Supreme Court has said:

> (T")he factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.' That is, to assess entanglement, we have looked to the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority. Similarly, we have assessed a law's 'effect' by examining the character of the institutions benefited (e.g., whether the religious institutions were 'predominantly religious'), and the nature of the aid that the State provided (e.g., whether it was neutral and nonideological). . . ."

Agostini v. Felton, 521 U.S. 203, 232-233, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (internal quotations and citations omitted). The *Agostini* Court continued:

> Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, see 403 U.S., at 614, 91 S.Ct., at 2112, and we have always tolerated some level of involvement between the two. Entanglement must be "excessive" before it runs afoul of the Establishment Clause. *See*,

> *e.g., Bowen v. Kendrick,* 487 U.S., at 615-617, 108 S.Ct., at 2577-2579 (no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits); *Roemer v. Board of Public Works of Md.,* 426 U.S. 736, 764-765, 96 S.Ct 2337, 2353-2354, 49 L.Ed.2d 179 (1976) (no excessive entanglement where State conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion).

Id. at 233, 117 S.Ct. 1997.

In *Lemon,* the Court observed that

> (o)ur prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in *Walz,* the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship. Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and

> variable barrier depending on all the circumstances of a particular relationship.

Lemon v. Kurtzman, 403 U.S. 602, 614, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

The BOCC argues that the RLUIPA, as applied in this case, required the BOCC to inquire whether the uses proposed by the RMCC constituted the exercise of religion. In addition, the BOCC says it was required to inquire whether denial of the special use application would burden substantially RMCC's religious exercise or deprive RMCC of reasonable opportunities to practice its religion. These required inquiries, the BOCC asserts, constitute an excessive entanglement of government with religion. I disagree.

No doubt, RLUIPA often will require a government body, like the BOCC, to evaluate whether the enforcement of land use regulations will burden religious exercise, will affect opportunities to practice religion, or has been administered equally between similarly situated religious and non-religious institutions. To a great extent, the U.S. Constitution also requires such evaluations. However, the assessments a government must make under RLUIPA do not require a pervasive monitoring of religious institutions or a detailed examination of those institutions that might support a claim of excessive entanglement. Rather, with inquires analogous to those found not to cause excessive entanglement in *Walz* and *Amos,* the BOCC can determine the nature of a religious institution and the extent to which land use

regulations may impose an improper burden or unequally administered regulation on a religious institution. The inquires required by RLUIPA are not analogous to the detailed and pervasive inquires at issue in *Colorado Christian University v. Weaver*, inquiries that the Tenth Circuit found to violate the excessive entanglement aspect of *Lemon*. 534 F.3d 1245, 1261-1266 (10th Cir.2008). In short, the relationship between the BOCC and religious institutions that is required under RLUIPA falls well within the acceptable relationship between government and religious organizations described in *Lemon* and does not constitute excessive entanglement of government with religion.

4. Conclusion

Thus, I conclude ultimately that, as applied in this case, the equal terms, substantial burden, and unreasonable limitations provisions of RLUIPA do not violate the Establishment Clause of the First Amendment.

B. Fourteenth Amendment

The BOCC challenges the constitutionality of the equal terms, substantial burden, and unreasonable limitations provisions of RLUIPA based on the contention that these provisions exceed Congress's enforcement powers under Section 5 of the Fourteenth Amendment. This is so, the BOCC contends, because these provisions of RLUIPA, as applied in

this case, effect substantive changes in constitutional protections and do not constitute proper remedial, preventative legislation designed to enforce constitutional protections.

To the extent the substantial burden provision of RLUIPA properly has been triggered under Congress's authority under the Commerce Clause, this argument is not applicable to the substantial burden provision. However, the substantial burden provision of RLUIPA has also a jurisdictional hook that implicates § 5. This "jurisdictional hook" provides that RLUIPA's substantial burden provision is applicable when

> the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. § 2000cc(a)(2)(C). This jurisdictional hook is implicated in this case. Therefore, I address the BOCC's § 5 challenge as to the equal terms, substantial burden, and unreasonable limitations provisions of RLUIPA as applied in this case.

Section 5 of the Fourteenth Amendment grants to Congress the power to "enforce, by appropriate legislation," the provisions of the Fourteenth Amendment. *U.S. Const. Amend. XIV, § 5.* Of course, the Due

Process Clause of the Fourteenth Amendment incorporates the Free Exercise and Establishment Clauses of the First Amendment. *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (the "fundamental concept of liberty embodied in the [Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment"). Thus, Congress may act to enforce the First Amendment's religion clauses under § 5.

The § 5 enforcement power is limited, however.

> Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," *South Carolina v. Katzenbach,* supra, [383 U.S.] [301] at 326, 86 S.Ct. [803], at 817-818[, 15 L.Ed.2d 769 (1966)]. The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

City of Boerne, 521 U.S. 507, 519, 117 S.Ct. 2157 (1997).

A challenge to an enactment under § 5 requires an examination of three issues. First, a court must "identify with some precision the scope of the constitutional right at issue." *Bd. of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 365 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). Second, a court must determine if Congress identified a history and pattern of unconstitutional conduct that it sought to remedy with the challenged enactment. *Id.* at 964-965. Third, a court must determine if the legislation is "congruent" and "proportional" to the injury to be prevented or remedied. *City of Boerne,* 521 U.S. at 532-536, 117 S.Ct. 2157; *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 81, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000).

Examining the limits of Congress's § 5 powers, the Supreme Court found RLUIPA's predecessor, the Religious Freedom Restoration Act (RFRA) of 1993, to be unconstitutional as applied to the states because RFRA far exceeded Congress's power under § 5 of the Fourteenth Amendment. *City of Boerne,* 521 U.S. 507, 117 S.Ct. 2157 (1997). The Court concluded that the RFRA was not congruent and proportional to the unconstitutional conduct that Congress sought to address. Rather, the Court concluded that RFRA

> is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears,

> instead, to attempt a substantive change in constitutional protections.
>
> * * *
>
> [RFRA's] (s)weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description regardless of subject matter.

City of Boerne, 521 U.S. at 532, 117 S.Ct. 2157.

1. Scope of the Constitutional Right at Issue

The text of the RLUIPA shows clearly that, in passing RLUIPA, Congress sought to protect the constitutional right of free exercise of religion and the right to equal protection of the law in the context of land use decisions. The Act's protections clearly are directed at religious assemblies and institutions. I agree with the conclusion of the Eleventh Circuit that the RLUIPA is designed to protect the non-discrimination principles of the Free Exercise and Establishment Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1238 (11th Cir.2004). In short, the scope of the rights at issue is the rights protected by the Free Exercise Clause of the First Amendment, made applicable to the states under the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment, as those rights implicate land use

decisions affecting religious assemblies or institutions.

As discussed above with regard to the BOCC's Establishment Clause challenge, many regulations that affect religious conduct are not subject to a free exercise challenge. The Free Exercise Clause does not "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Division v. Smith,* 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). The *Smith* Court distinguished *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and related cases because those cases involved systems of "individualized exemptions" that lent themselves to individualized governmental assessment of the reasons for a person's conduct. *Smith,* 494 U.S. at 884, 110 S.Ct. 1595.

In sum,

> the free exercise clause does not prohibit Congress and local governments from validly regulating religious conduct. Neutral rules of general applicability normally do not raise free exercise concerns even if they incidentally burden a particular religious practice or belief. Thus a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest

> to survive a constitutional [free exercise] challenge.

Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649 (10th Cir.2006) (quotations and citations omitted).

> (T)he defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (*e.g.*, a law excluding members of a certain sect from public benefits . . .); whereas, the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment. . . .

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 557, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (Scalia, J., concurring) (citations omitted; emphasis in original). Generally, "land use regulations, i.e., zoning ordinances, are neutral and generally applicable notwithstanding that they may have individualized procedures for obtaining special use permits or variances." *Grace United Methodist Church,* 451 F.3d at 651 (internal quotation omitted).

A law that is not generally applicable because its design, construction, or enforcement targets the practices of a particular religion for discriminatory treatment is subject to a free exercise challenge. If such a law imposes a substantial burden on the plaintiff's free exercise of religion, then the burden

will not withstand a free exercise challenge unless the burden can be justified by a compelling governmental interest. *Sherbert,* 374 U.S. at 403, 83 S.Ct. 1790. Generally, when the government must articulate a compelling governmental interest to justify its action, it also must accommodate that interest via the least restrictive means that can accommodate the interest. *See, e.g., Soskin v. Reinertson,* 353 F.3d 1242, 1247 (10th Cir.2004).

Under the Equal Protection Clause, a law that discriminates among religions or discriminates between religion and non-religion may be subject to the strict scrutiny analysis. *See Colorado Christian University v. Weaver,* 534 F.3d 1245, 1256 (10th Cir.2008) (government decisions that discriminate among religions subject to strict scrutiny; *citing Larson v. Valente,* 456 U.S. 228, 246, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982)). However, when discrimination affecting free exercise rights is the primary issue, equal protection analysis takes a back seat. The Supreme Court has rejected attempts to invoke strict scrutiny under the equal protection clause, based on religious discrimination, when the challenged state action is not a violation of the Free Exercise Clause. *Locke v. Davey,* 540 U.S. 712, 721 n. 3, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004). "(I)f a challenged program comports with the Free Exercise Clause, that conclusion wraps up the religious discrimination analysis. Thus, rational basis scrutiny applies to any further equal protection inquiry." *Eulitt ex rel. Eulitt v.*

Maine, Dept., of Educ., 386 F.3d 344, 353-354 (1st Cir.2004).

2. History and Pattern of Unconstitutional Conduct

With regard to RLUIPA's land use provisions, the provisions at issue in this case, Congress compiled what it considered to be "massive evidence" of widespread discrimination against religious institutions by state and local officials regarding land – use decisions, and concluded that often these decisions frustrated a core aspect of religious exercise – the ability to worship. See Joint Statement, 146 Cong. Rec. S7774-75; H.R.Rep. No. 106-219, at 21-24. Congress found also that while systems of individualized land use assessments readily lend themselves to discrimination against religious assemblies, it is difficult to prove discrimination in any particular case. See 146 Cong. Rec. at S7775; H.R.Rep. No. 106-219, at 18-24.

> The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case. But the committees in each house have examined large numbers of cases, and the hearing record reveals a widespread pattern of discrimination against churches as compared to secular places of assembly, and of

> discrimination against small and unfamiliar denominations as compared to larger and more familiar ones.

146 Cong. Rec. at S7775. "It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *Kimel,* 528 U.S. at 80-81, 120 S.Ct. 631 (internal quotations and citations omitted).

In its **Motion To Dismiss Amended Complaint** [# 34], filed June 30, 2006, the BOCC summarized well the arguments against the conclusion that Congress properly identified and circumstantiated a history and pattern of unconstitutional conduct that provides a sufficient basis for RLUIPA's land use provisions. Particularly in light of the deference that I must grant to the determinations of Congress in this arena, I conclude that Congress adequately identified and circumstantiated a pattern of unconstitutional conduct that provides an adequate foundation for the RLUIPA land use provisions at issue in this case.

3. Congruence and Proportionality

The key issue in the § 5 analysis in this case is whether RLUIPA's equal terms, substantial burden, and unreasonable limitation provisions are congruent and proportional to the problem Congress sought to address in passing the Act. Of course, if no pattern of unconstitutional conduct has been identified, as the

BOCC has argued, then it is difficult to conclude that the legislative solution passed to solve a non-existent problem is congruent and proportional to the non-problem. To some extent, the BOCC's argument about congruence and proportionality is based on a contention that Congress did not identify and circumstantiate a problem that RLUIPA properly is designed to solve. Again, I conclude that Congress sufficiently identified a problem of land use decisions improperly limiting the free exercise of religion, and, thus, I reject the BOCC's congruence argument to the extent it is based on the contention that Congress did not properly identify a history and pattern of unconstitutional conduct. RLUIPA's land use provisions are not a solution in search of a problem.

Again, even when a problem has been identified and circumstantiated properly, the law designed to address the problem cannot significantly alter the meaning of the constitutional right in question, and the law must be congruent and proportional to the problem addressed. *City of Boerne,* 521 U.S. at 519, 117 S.Ct. 2157. The BOCC argues that the RLUIPA's equal terms and unreasonable limitation provisions are improper under § 5 because they expand substantially the RMCC's rights under the Free Exercise and Equal Protection clauses.

The BOCC notes that the jury found in favor of the BOCC on all of the RMCC's claims under the Constitution. These claims included claims under the Free Exercise Clause, the Free Speech Clause, and for violation of the RMCC's constitutional right to

freedom of association. Because the jury found in favor of the BOCC on all of RMCC's constitutional claims, the BOCC argues, the RLUIPA, as applied in this case, necessarily creates additional rights beyond those guaranteed by the Constitution, and the creation of those additional rights goes beyond Congress's § 5 powers.

I do not agree with the BOCC's argument that the jury's verdicts in this case necessarily demonstrate that RLUIPA creates rights greater than those provided in the Constitution. The jury's deliberations are inscrutable, and one readily can posit a scenario in which the jury's verdicts were based on a compromise or some other rationale that is not dependent on a conclusion that there were no violations of the Constitution in this case. In divining the rationale behind the jury's verdicts, few assumptions are safe. The jury's verdicts do not mandate the conclusion that RLUIPA, as applied in this case, creates rights for the RMCC greater than those provided in the Constitution.

The BOCC argues also that the RLUIPA grants rights that exceed substantially the protections provided to religious institutions and assemblies by the Free Exercise and Equal Protection clauses in the land use context. *Motion To Dismiss Amended Complaint* [# 34], filed June 30, 2006, p. 22-24. The application of the Free Exercise and Equal Protection clauses in the context of land use decisions must be considered in evaluating this issue. If the RLUIPA substantially expands the RMCC's free exercise or

equal protection rights in this context, then Congress may have exceeded its § 5 powers in passing RLUIPA.

As in its Establishment Clause argument, the BOCC argues that the RLUIPA, as applied in this case, expands substantially the RMCC's rights in the land use context because the RLUIPA effectively requires the BOCC to grant the RMCC an exemption from land use regulations that otherwise would apply to the RMCC. Again, this argument is based on the contention that, absent the RLUIPA, the RMCC would have no valid constitutional basis to challenge the BOCC's denial of the RMCC's 2004 special use application.

Again, the BOCC's analysis ignores a key aspect of the jury's verdict in this case. The jury found in favor of the RMCC on the RMCC's equal terms claim, concluding that the BOCC had imposed or implemented a land use regulation in a manner that treats the RMCC, a religious institution, on less than equal terms with a similarly situated nonreligious assembly or institution, the Dawson School. This conclusion by the jury takes the BOCC's denial of the special use application outside of the protection accorded to land use laws that are viewed as neutral and generally applicable because this conclusion indicates that the Land Use Code, as applied to the RMCC, was not generally applicable. Again, "the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory

treatment. . . ." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 557, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (Scalia, J., concurring) (citations omitted; emphasis in original).

The fact that the jury found in favor of the BOCC on the RMCC's claims alleging discrimination on the basis of religion does not change this analysis. Unequal treatment between similarly situated religious and non-religious comparators subjects the BOCC's decision to the non-discrimination principles of the Free Exercise and Establishment Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. The fact that the jury concluded that this unequal treatment did not arise from a motive to discriminate against religion does not somehow cleanse the finding of unequal treatment and thus shield the BOCC from the more rigorous analysis applicable when there is such unequal treatment.

In this case, the RLUIPA's requirement that similarly situated religious and non-religious assemblies or institutions be treated equally does not expand on the requirements of the religion clauses of the First Amendment or the Equal Protection Clause. Rather, the RLUIPA's requirement of equal treatment essentially parrots the requirements of the religion clauses and the Equal Protection Clause, as they are applied to religion. The unreasonable limitation provision of RLUIPA, viewed on its own limited terms, might be seen as a significant expansion of the rights of religious institutions and assemblies

because the Free Exercise and Equal Protection clauses do not prohibit all limitations that might be labeled as "unreasonable", at least when those limitations are imposed by laws that are neutral and generally applicable. As applied in this case, however, the unreasonable limitations provision does not provide an improper expansion of the RMCC's rights. Most notably, the jury in this case easily could have concluded that the limitations at issue were unreasonable because they were imposed under a system that caused the BOCC to treat the RMCC on less than equal terms than the secular Dawson School. Applying this narrow but reasonable interpretation of the jury's verdicts, I conclude that the unreasonable limitations provision, as applied in this case, is congruent and proportional to the problem identified by Congress, does not attempt to expand significantly the constitutional rights of the RMCC, and thus properly falls within Congress's power under § 5.

Turning to the RLUIPA's substantial burden provision, I note first that, in view of the RMCC's allegations and the jury's verdicts, the substantial burden "jurisdictional hook" concerning land use regulations imposed via individualized assessments is applicable in this case. Again, that jurisdictional provision provides that RLUIPA's substantial burden provision is applicable when

> the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or

> informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. § 2000cc(a)(2)(C). With the jury's finding of unequal treatment, the BOCC's denial of the RMCC's special use application fairly can be viewed as a burden imposed under a land use regulation that resulted in an individualized assessment of the RMCC's proposed uses of its property.

In the context of such an individualized assessment, the standard of *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), applies. If such a law imposes a substantial burden on the plaintiff's free exercise of religion, then the burden will not withstand a free exercise challenge unless the burden can be justified by a compelling governmental interest and that interest is accommodated by the least restrictive means available. *Sherbert,* 374 U.S. at 403, 83 S.Ct. 1790 (compelling interest); *See, e.g., Soskin v. Reinertson,* 353 F.3d 1242, 1247 (10th Cir.2004) (compelling interest justification requires least restrictive means). RLUIPA's substantial burden provision simply parrots this strict scrutiny standard. Thus, in the context of this case, RLUIPA's substantial burden provision is congruent and proportional to the problem identified by Congress, does not attempt to expand significantly the constitutional rights of the RMCC, and thus properly falls within Congress's power under § 5.

In other contexts, RLUIPA's substantial burden provision could be read to apply the strict scrutiny standard to land use regulations that are, under applicable law, neutral rules of general applicability. In that circumstance, RLUIPA might be seen as attempting to expand significantly the constitutional rights of religious assemblies and institutions. However, this case does not present such circumstances.

I note also that RLUIPA does expand free exercise rights in one respect. As discussed above, RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," including the "use, building, or conversion of real property for the purpose of religious exercise. . . ." § 2000cc-5(7). This definition of "religious exercise" is broader than the definition of "religious exercise" used in constitutional jurisprudence under the First Amendment. Generally, the Supreme Court has limited free exercise claims to religious beliefs or practices that are central or fundamental to a person's religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* 508 U.S. 520, 565, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Grace United Methodist Church v. City Of Cheyenne,* 451 F.3d 643, 662 (10th Cir.2006).

Congress's expansion of the term "religious exercise" in RLUIPA does not necessarily exceed Congress's power under § 5. Under § 5, Congress is authorized to enact "prophylactic" legislation that prohibits a "somewhat broader swath" of conduct, including that which is not itself forbidden by the

Amendment's text," as long as there is proof of widespread unconstitutional conduct by the states, and the legislation is "congruent" and "proportional" to the injury to be prevented or remedied. *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 81, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000); *Tennessee v. Lane,* 541 U.S. 509, 526-531, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004). Here, Congress identified what it saw as a widespread problem of discrimination or unequal treatment of religious institutions in the context of land use decisions. The expansion of the definition of religious exercise in RLUIPA relates directly to land use by religious institutions and eliminates the need to parse which aspects of a church's land use fall within the traditional definition of religious exercise and which do not. This limited expansion of free exercise rights is proper under Congress's § 5 powers because it is limited, congruent, and proportional to the injury addressed by Congress in the land use provisions of RLUIPA.

4. Conclusion

Having considered the scope of the constitutional rights at issue, the history and pattern of unconstitutional conduct identified by Congress, and the congruence and proportionality of RLUIPA's equal terms, substantial burden, and unreasonable limitation provisions, as applied in this case, I conclude that those provisions of RLUIPA are within Congress's power under § 5 of the Fourteenth Amendment.

I note that the BOCC also has challenged the RLUIPA as exceeding Congress's power under the Commerce Clause, which provides one of the jurisdictional hooks for the substantial burden provision. *Motion To Dismiss Amended Complaint,* [# 34], filed June 20, 2006, pp. 24-25. Because I have found the relevant RLUIPA sections to be constitutional, as applied in this case, under Congress's § 5 powers, I decline to address this constitutional question.

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law.

Spector Motor Service v. McLaughlin, 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944) (Frankfurter, J.). "This is a 'fundamental rule of judicial restraint,' which has received the sanction of time and experience." *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1, 14-15, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) (citing *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering,* P.C., 467 U.S. 138, 104 S.Ct. 2267, 81 L.Ed.2d 113 (1984)).

V. CONCLUSION & ORDER

For the reasons detailed in this order, I conclude under FED.R.CIV.P. 50 that the evidence presented at trial is sufficient to support the jury's verdicts in favor of the RMCC and against the BOCC under RLUIPA's equal terms, substantial burden, and unreasonable limitations provisions, as those provisions have been applied in this case. I conclude also that those provisions, as applied in this case, do not violate the Establishment Clause of the First Amendment and do not exceed Congress's enforcement powers under Section 5 of the Fourteenth Amendment.

THEREFORE, IT IS ORDERED that the Defendant's Renewed Motion for Judgment as a Matter of Law [# 279], filed January 5, 2009, is DENIED.

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROCKY MOUNTAIN CHRISTIAN CHURCH,

Plaintiff-Appellee,

and

UNITED STATES OF AMERICA,

Intervenor-Plaintiff-Appellee,

v.

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, COLORADO,

Defendant-Appellant.

COLORADO COUNTIES, INC.; THE COLORADO MUNICIPAL LEAGUE; THE NATIONAL LEAGUE OF CITIES, INC.; THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; AMERICAN PLANNING ASSOCIATION; COLORADO CHAPTER OF THE AMERICAN PLANNING ASSOCIATION; AMERICAN JEWISH CONGRESS; NATIONAL COUNCIL OF CHURCHES; QUEENS FEDERATION OF CHURCHES;

No. 09-118

GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA; NATIONAL COMMITTEE FOR AMISH RELIGIOUS FREEDOM; ARCHDIOCESE OF DENVER; ARCHDIOCESE OF KANSAS CITY IN KANSAS; ARCHDIOCESE OF OKLAHOMA CITY; ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; CHERRY HILLS COMMUNITY CHURCH; CHRISTIAN & MISSIONARY ALLIANCE; COLORADO CHRISTIAN UNIVERSITY; DIOCESE OF COLORADO SPRINGS; EPISCOPAL DIOCESE OF COLORADO; EPISCOPAL DIOCESE OF WYOMING; EVANGELICAL CHRISTIAN CREDIT UNION; FIRST PRESBYTERIAN CHURCH OF COLORADO SPRINGS; GENERAL CONFERENCE OF THE CHURCH OF GOD (SEVENTH DAY); NEW LIFE CHURCH; O CENTRO ESPIRITA BENEFICENTE UNIAO DO VEGETAL; REGIS UNIVERSITY; VILLAGE SEVEN PRESBYTERIAN CHURCH,

Amici Curiae.

ORDER

July 19, 2010

Before **KELLY**, **MURPHY**, and **O'BRIEN**, Circuit Judges.

This matter is before the court on the appellant's *Petition For Limited Panel Rehearing*. We also have a response from the appellee. The request for rehearing is granted in part. We will amend the panel's original decision, and attach a copy of the new opinion to this order. The petition is granted to the extent of the changes made at new pages 10 and 14. The request is otherwise denied. The Clerk is directed to issue the new decision forthwith.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER
Clerk of Court

OPPOSITION BRIEF

FILED
NOV 18 2010
OFFICE OF THE CLERK

No. 10-521

In the Supreme Court of the United States
OCTOBER TERM, 2010

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, *PETITIONER*,

v.

ROCKY MOUNTAIN CHRISTIAN CHURCH AND UNITED STATES OF AMERICA, *RESPONDENTS*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

J. THOMAS MACDONALD
OTTEN, JOHNSON, ROBINSON, NEFF & RAGONETTI
950 Seventeenth Street
Denver, Colorado
ERIC RASSBACH
LORI WINDHAM
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K Street, N.W.
Washington, DC 20036

KEVIN T. BAINE
Counsel of Record
EVA PETKO ESBER
CURTIS J. MAHONEY
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5010
kbaine@wc.com

Counsel for Respondent Rocky Mountain Christian Church

QUESTIONS PRESENTED

1. Whether a county violates the "equal terms" provision of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc(b)(1) (2006), when it treats a religious organization less favorably than a similarly situated secular organization.

2. Whether a county violates the "unreasonable limitations" provision of RLUIPA, 42 U.S.C. § 2000cc(b)(3)(B), when it severely limits the amount of space available for church construction in the jurisdiction and subjects a religious organization to arbitrary procedures that render compliance exceedingly difficult.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Rocky Mountain Christian Church is a non-profit corporation organized under the laws of the State of Colorado. It is not a subsidiary or affiliate of a publicly held company. No publicly owned company owns any part of it.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS FOR DENYING THE PETITION 7

A. The County Has Waived the Question Presented in its Petition 9

B. The Decision Does Not Conflict with that of any other Circuit 10

1. The Asserted Split over the "Similarly Situated" Requirement 10

2. The Asserted Split over the Availability of an Affirmative Defense 16

3. The Asserted Split over the Unreasonable Limitations Provision 18

C. The Tenth Circuit's Decision Was Correct and Will Not Open the Floodgates. 20

CONCLUSION 22

TABLE OF AUTHORITIES

Federal Cases

Am. Airlines v. Christensen, 967 F.2d 410 (10th Cir. 1992) 9

Bd. of County Comm'rs of Boulder Cnty. v. Rocky Mountain Christian Church, 481 F. Supp. 2d 1181 (D. Colo. 2007) 5

Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 615 F. Supp. 2d 980 (D. Ariz. 2009) 18

Chapman v. United States, 500 U.S. 453 (1991) 10

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 14

Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003) 6

Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007) 11, 17

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004) 7, 11, 17, 18

Primera Iglesia Bautista Hispana v. Broward County, 450 F.3d 1295 (11th Cir. 2006) 11, 12, 14

Reeves v. Sanderson Plumbing Prods, Inc., 530 U.S. 133 (2000) 20

River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367 (7th Cir. 2010) 11, 17

Russello v. United States, 464 U.S. 16 (1983) 16

United States v. Wong Kim Bo, 472 F.2d 720 (5th Cir. 1972) 16

Vision Church v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006) 18, 19

Statutes

42 U.S.C. § 2000 (Religious Land Use and Institutionalized Persons Act of 2000) .... Passim

Other Authorities

146 Cong. Rec. S7774–75 (daily ed. July 27, 2000) 21

STATEMENT

A jury sitting in the United States District Court for the District of Colorado found that Petitioner—the Board of Commissioners of Boulder County ("the County")—had violated two provisions of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc–2000cc-5 (2006). First, it found that the County had violated RLUIPA's "equal terms" provision, which prohibits a government entity from "impos[ing] or implement[ing] a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." § 2000cc(b)(1). And second, the jury found that the County had violated RLUIPA's "unreasonable limitations" provision, which prohibits a government entity from "impos[ing] or implement[ing] a land use regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." § 2000cc(b)(3)(B).

In an opinion decided on the narrowest possible grounds, the United States Court of Appeals for the Tenth Circuit held that there was sufficient evidence in the record to support both jury findings as a matter of law. [1] The Court had no reason to delve into the weighty constitutional questions the County

---

[1] The jury also found that the County had violated RLUIPA's "substantial burden" provision, § 2000cc(a), but the Court of Appeals did not find it necessary to review that finding given its affirmance of the judgment based on the equal terms and unreasonable limitations verdicts.

showcases in its Petition for Certiorari, because it found that "[*t*]*he County waived its constitutional challenges* to the equal terms and unreasonable limitations provisions" by not preserving them in its opening brief on appeal. Petition Appendix ("App.") at 18 (emphasis added). Nor did the Court have occasion to take sides on any Circuit split: the splits alleged in the Petition are either illusory or irrelevant to this case as it has been presented. What remains for this Court to review, therefore, is little more than a fact-bound, sufficiency-of-the evidence challenge that touches upon aspects of RLUIPA that have not generated any serious divisions of authority. The Petition thus raises no issues of national importance and should be denied.

1. Rocky Mountain Christian Church ("the Church" or "RMCC") is a nondenominational Christian church located in Niwot, Colorado, an unincorporated section of Boulder County. The Church is located in a rural, but nonetheless developed, portion of the County. It is situated next to a large housing development, a high school, and a water treatment facility. App. 5. The County has designated certain parcels of land near the Church as "receiving areas" for "transferable development rights." *See* Court of Appeals Appellant's Appendix ("A.") at 4031:10–18. This means that developers who own land designated as a "sending area" may, under certain circumstances, transfer development rights to a receiving area. In other words, Petitioner discourages development in certain parts of Boulder County by encouraging higher-density development on certain parcels located near the Church.

The Church acquired its 55-acre Niwot tract in a series of three transactions from 1985 through 1994. A. 3406:7-11. With the County's approval, the Church ultimately built a 106,000 square foot facility, which includes worship space, classrooms, a gymnasium, and a 380-student kindergarten-through-eighth-grade school, the Rocky Mountain Christian Academy. A. 3411:3-10. The County's Land Use Director testified at trial that the existing facility is "compatible with the harmony of this rural neighborhood." A. 3934:12-16.

2. In 2002, the Church requested permission from the County to expand the student body at the Christian Academy by 120 students and to place temporary modular units on the Niwot campus. The County approved use of the modular units for three years and advised the Church that its application to replace the modular units with a permanent structure must include a master plan outlining all of the Church's future development goals for the site.

The Church complied with the County's request by hiring outside consultants to assess its future growth needs. The consultants determined that the Church ultimately would grow to include over 8,000 members and would require a minimum of 300,000 square feet of space to accommodate the congregation's needs. A. 3692:16–3693:19. When it came time to submit the master plan to the County, however, the Church asked for approval of a much smaller expansion of its existing facilities—a 28,000 square-foot gymnasium, a 6,500 square-foot chapel, 57,500 square-feet of additional space for the school building, gallery space connecting the new and existing buildings, and a modest 150-seat expansion

of the main worship building's seating capacity (but not its size). App. 7. In its Petition, the County asserts that the Church's proposed 240,800 square foot facility would be "Boulder County's largest building." Pet. 6. However, as the Tenth Circuit noted, an industrial park neighboring the Church, the Boulder Technology Center, contains 500,000 square feet of space. App. 5.

3. As the Tenth Circuit noted in its opinion, "[t]he County's land use staff found that the application met the objective requirements [of Boulder County's Comprehensive Plan governing land use], but conflicted with the subjective goals of the Comprehensive Plan." App. 7. Specifically, the staff found that the Church's proposal would result in an "over-intensive use of the land," a decision the staff made only after it applied a special formula for determining land-use intensity that it had not applied when evaluating other applications.[2] The staff recommended that the application be rejected. The County largely adopted the staff's recommendation, denying all of the application except for the 150-seat expansion of the Church's main worship space and a 10,000-foot permanent

---

[2] App. 7–8 ("The staff report used an unusual method to find that the expansion would be an over-intensive use: typically, a proposed use is not over-intensive if less than 50% of the site's surface area would be covered by a structure or a parking lot, and in this case the expansion would only result in 35% coverage. Instead, the land use staff deemed the expansion an over-intensive use because it doubled the church's square footage and significantly increased the parking area." (citations omitted)).

addition to replace the temporary modular units the County had approved in 2002. App. 8.

As the Court of Appeals noted in its opinion, in addition to being required to jump through newly erected bureaucratic hoops, the Church was also subjected to derogatory comments by one of the County's Planning Commissioners, who snidely greeted the Church's veteran land use consultant at a key hearing by remarking, "'Rosi, you can bring in your Christians now.'" *Id.*

4. The County denied the Church's application to expand its school and gymnasium facilities, even though it had approved a nearly identical application for an expansion project of similar scope that was submitted by a secular institution, the Alexander Dawson School. Dawson had received permission to build a similar size gym, and its resulting buildings were, as the County's land use expert testified, "similar[ ]" in terms of the "total amount of square footage" to the Church's proposed project. A. 4708:1–2; App. 12. The Church and the Dawson School are both located in "Agricultural Districts and designated as agricultural lands of importance." App. 12. The only material difference is that, compared to the Church, the Dawson School is in "a more rural area," A. 4212:19–20 (Testimony of R. Koopman), a factor that would seem to make the school's location *more* environmentally sensitive than the Church's.

5. Shortly after the Church's application was denied, the County unsuccessfully sought a declaratory judgment that it had acted consistently with RLUIPA. *See Bd. of County Comm'rs of Boulder Cnty. v. Rocky Mountain Christian Church*,

481 F. Supp. 2d 1181, 1190 (D. Colo. 2007) (dismissing the County's complaint). The Church filed its own action, seeking an injunction to require the County to approve its application. The matter proceeded to trial, and after 12-days of proceedings that included expert testimony offered by both sides, the jury returned a verdict in favor of the Church, finding that the County had violated RLUIPA's equal terms, unreasonable limitations, and substantial burden provisions.[3] The presiding judge, the Honorable Robert E. Blackburn, denied the County's post-trial motion for judgment as a matter of law and entered a permanent injunction requiring the County to approve the Church's application.

6. The County appealed, and the Tenth Circuit affirmed the District Court's ruling on the narrowest possible grounds. It avoided any discussion of constitutional issues or of the RLUIPA provision that has stoked the most controversy among the Courts of Appeals—the substantial burden provision.[4]

---

[3] The substantial burden provision states: "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1).

[4] *Compare Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("We therefore hold that, in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious

Instead, the Tenth Circuit affirmed on the basis of two other RLUIPA provisions—the equal terms and unreasonable limitations provisions. App. 18 ("Because we affirm the permanent injunction on the basis of the equal terms and unreasonable limitations verdicts, as discussed below, we need not review the sufficiency of the evidence of the substantial burden claim.").

The Court explicitly declined to address the constitutional questions that the County raises in its Petition. It explained that the County had "preserved only its challenge to the constitutionality of RLUIPA's substantial burden provision," which the Court found it unnecessary to address because the verdict could be upheld on the basis of the equal terms and unreasonable limitations verdicts. App. 18. "The County waived its constitutional challenges to the equal terms and unreasonable limitations provisions," the Court concluded, "because its mention of those arguments in its opening brief, Aplt's Br. at 38 n.7, is too cursory and undeveloped for review." *Id.*

REASONS FOR DENYING THE PETITION

This case is not a suitable vehicle for reaching the question presented in the Petition, because the question was neither presented to nor decided by the

---

exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable."), *with Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("[W]e decline to adopt the Seventh Circuit's definition—which would render [RLUIPA] § b(3)'s total exclusion prohibition meaningless . . . .").

Court of Appeals. The County raises a seemingly august question of constitutional law—whether the equal terms and unreasonable limitations provisions of RLUIPA are constitutional. But, as the County concedes in a footnote, "[t]he Tenth Circuit avoided a discussion of whether its interpretation of RLUIPA was unconstitutional as applied by claiming that Boulder County did not adequately preserve its constitutionality argument." Pet. 29 n.4.

The County's waiver problem extends to its statutory interpretation arguments as well. Until its Petition for Rehearing in the Court of Appeals, the County had not disagreed with how the District Court articulated the elements of an RLUIPA equal terms claim. Indeed, the County's own proposed jury instruction is virtually indistinguishable from the standard subsequently applied by the Tenth Circuit. *Compare* A. 2702-03 (County's proposed jury instruction), *with* App. 11.

Waiver issues aside, this case does not present an occasion to resolve any Circuit split over the appropriate standard to be applied in an equal terms case: there is no split over the standard governing *as-applied* challenges like the Church's in this case, and the Tenth Circuit's decision is, in any event, fully consistent with any standard that the County might belatedly espouse. There is, likewise, no Circuit split regarding application of RLUIPA's unreasonable limitations provision.

Finally, the Court of Appeals' carefully crafted, narrow opinion was correct on the merits and, as a practical matter, will have very little effect on local government planning efforts in the Tenth Circuit—as long as counties and municipalities apply their

land use codes in the evenhanded manner Congress intended when it enacted RLUIPA.

A. The County Has Waived the Question Presented in its Petition.

The Petition purports to present a single question: "Whether the Equal Terms and Unreasonable Limitations provisions of [RLUIPA] expand the scope of legal protection granted to religious exercise beyond that established by the First Amendment and thus violate the Establishment Clause and Section 5 of the Fourteenth Amendment." Pet. i. As the County recognizes, however, Pet. 29 n.4, the Court of Appeals held unequivocally that "[t]he County waived its constitutional challenges to the equal terms and unreasonable limitations provisions . . . , because its mention of those arguments in its opening brief . . . [was] too cursory and undeveloped for review." App. 18, *citing Am. Airlines v. Christensen*, 967 F.2d 410, 415 n.8 (10th Cir. 1992).[5]

The County suggests that the Court may overlook this glaring defect by addressing the constitutional issues presented in its petition via the canon of constitutional avoidance. Pet. 29 n.4 (citing

[5] In the single footnote in its opening brief addressing these issues, the County said that its constitutional challenge to the substantial burden provision "may not be applicable to the equal terms and unreasonable limitations provisions," but that the same arguments would apply "if this Court were to conclude that the equal terms or unreasonable limitations provision expands constitutional guarantees." Aplt's Br. 38 n.7.

Chapman v. United States, 500 U.S. 453, 464 (1991)). It is, of course, true that the Court will construe ambiguous statutes in ways that avoid constitutional difficulties. But that is no reason for this Court to entertain a petition that purports to present a constitutional issue that has not been preserved.

B. The Decision Does Not Conflict with that of any other Circuit.

The County argues that the Court should grant the petition to resolve several purported splits among the Courts of Appeals on how the pertinent RLUIPA provisions should be interpreted. But the Tenth Circuit did not take sides on any Circuit split, and its decision does not conflict with that of any other Circuit.

1. The Asserted Split over the "Similarly Situated" Requirement.

The Courts of Appeals have adopted different approaches to assessing *facial* challenges to land use regulations under RLUIPA's equal terms provision.

In *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), the Court of Appeals for the Eleventh Circuit held that a zoning ordinance excluding churches and synagogues from locations where private clubs and lodges were permitted violated the equal terms provision on its face. The Court reasoned that churches and synagogues, like private clubs and lodges, were "assemblies or institutions" within the meaning of RLUIPA, and that there was no compelling governmental interest to justify the differential treatment *Id.* at 1230–35.

In *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007), another case involving a facial equal terms challenge, the Third Circuit held that "a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*." *Id.* at 264. And in *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367 (7th Cir. 2010) (en banc), the Seventh Circuit essentially agreed with the Third Circuit's approach, refining it "by a shift of focus from regulatory *purpose* to accepted zoning *criteria*." *Id.* at 371 (emphasis in original).

These different approaches to facial equal terms challenges do not affect this case for at least three reasons:

First, there is no split among the Circuits over how to apply the equal terms provision to claims like the one in this case—that a facially neutral provision has been applied in an unequal manner. Indeed, the Eleventh Circuit, whose approach to the facial challenge in *Midrash* is criticized by the County, explicitly distinguished between the standards to be applied in the as-applied and facial contexts. *See Primera Iglesia Bautista Hispana v. Broward County*, 450 F.3d 1295, 1311 n.11 (11th Cir. 2006) ("Although Primera relies on our decision in *Midrash* for the proposition that, for Equal Terms purposes, non-religious comparators need not be similarly situated to the religious plaintiff, its reliance is misplaced. *Midrash* involved a *facial* Equal Terms challenge . . . ."). The court went on to adopt an as-applied standard that is indistinguishable from the

one the Tenth Circuit adopted in this case. *Compare Primera Iglesia*, 450 F.3d at 1311 ("A plaintiff bringing an as-applied Equal Terms challenge must present evidence that a similarly situated nonreligious comparator received differential treatment under the challenged regulation."), *with* App. 11 ("[T]he district court properly instructed the jury that RMCC must establish 'that [the County] treated [RMCC] less favorably in processing, determining, and deciding the 2004 special use application of the [RMCC] than [the County] treated a similarly situated nonreligious assembly or institution.'").

Facial challenges are different from as-applied challenges. They require the court to consider in broad terms whether churches are sufficiently similar to other types of assemblies to require that they be included generally within the same category of uses. By contrast, a claim that a facially neutral regulation was applied in an unequal fashion requires the religious institution to point to a specific secular comparator, as the Church did here. The court (and jury) then must make a detailed comparison of the particular features of those specific institutions and how they were treated. In these kinds of cases, there is no split or tension among the decisions of the Circuits.

Second, the County waived any argument that the courts below should have applied a different standard. It requested and received a jury instruction that was, in all relevant respects, identical to the Tenth Circuit standard that it now criticizes as inadequate. This standard enabled the County to offer *any* reason that might explain why it

treated the Dawson School more favorably than the Church. The Country's proposed instruction read as follows:

> To prove that the County violated the "Equal Terms" provision of RLUIPA, RMCC must establish each of the following elements by a preponderance of the evidence:
>
> (1) That the County implemented a land use regulation
> (2) in a manner that treated a religious assembly or institution
> (3) on less than equal terms
> (4) with a nonreligious assembly or institution
> (5) that was similarly situated to RMCC.

A. 2702-03.[6] The County did not request an instruction that the nonreligious institution be similarly situated to RMCC *with respect to the regulatory purpose or criteria*, and the District Court, therefore, did not give such an instruction.[7] Once a

---

[6] The full jury instruction given by the District Court read as follows:

> "Less than equal terms" means that the Board of County Commissioners treated Rocky Mountain Church less favorably in processing, determining, and deciding the 2004 special use application of the Rocky Mountain Christian Church than the Board of County Commissioners treated a similarly situated nonreligious assembly or institution.

A. 3084.

[7] The County's proposed instruction defined the phrase "similarly situated" as follows:

party proposes a jury instruction that incorporates a certain understanding of the law, it cannot reverse field and argue for a different interpretation on appeal (much less in a petition for certiorari). *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999) ("As the city itself proposed the essence of the instructions given to the jury, it cannot now contend that the instructions did not provide an accurate statement of the law.")

Understandably, the County did not argue on appeal that the jury instruction it had requested was inadequate.[8] Nor did it call the Court of Appeals' attention to any Circuit split on the applicable standard.[9] In short, the County did not preserve any argument that any different standard should have been applied.

> A nonreligious assembly or institution was "similarly situated" to RMCC if that nonreligious assembly or institution sought approval of a structure or structures comparable to that sought by RMCC in its 2004 Special Use application and that was to be located on land that is subject to the same zoning and other land use regulations as and is otherwise comparable to RMCC's Niwot property in 2004.

A. 2703.

[8] As the Court of Appeals noted, the County "acknowledged at oral argument that it has not challenged the [jury] instructions on appeal." App. 11.

[9] The County's main brief quoted with approval the Eleventh Circuit's statement in *Primera Iglesia* that "[a] plaintiff bringing an as-applied Equal Terms challenge must present evidence that a *similarly situated* nonreligious comparator received differential treatment under the challenged regulation." 450 F.3d at 1311; *see* Aplt's Br. at 31.

Third, the evidence was sufficient to support a verdict under any standard that one might articulate. The Court of Appeals held that there was "ample evidence" to support the jury's conclusion that RMCC was "similarly situated" to a nonreligious school, the Dawson School, whose application for a similar expansion was granted. App. 12. Among the "many substantial similarities" between the two applications were that both involved expansion of school facilities, "the total resulting square footage of the two projects was similar," "both would have built gymnasiums of roughly the same size, . . . and both properties were located in Agricultural Districts and designated as agricultural lands of importance." *Id.*

Those observations were more than sufficient to meet the standards that the County now espouses: the two projects were similarly situated with respect to the regulatory purpose or criteria, because they involved the construction of similarly sized projects for the same uses (a school and gymnasium) on land designated for the same purposes. In fact, if anything, the RMCC project was more consistent with the regulatory purpose and criteria than the Dawson School project. The Dawson School is in "a more rural area," and the County has encouraged higher density development in the area surrounding the Church by designating parts of that area as receiving zones for "transferable development rights." A. 4212:19–20; A. 4031:10–18.

In sum, the Tenth Circuit's decision is not inconsistent with the approach taken by any other Court of Appeals in an as-applied case. The District Court and the Court of Appeals applied a standard that was essentially the same standard that the

County itself had advocated. And their decisions are fully consistent with the approach other Circuits have taken even in facial challenges. The petition, therefore, does not present any conflict among the Circuits.

2. The Asserted Split over the Availability of an Affirmative Defense

The County also asserts a conflict among the Circuits on whether the equal terms provision of RLUIPA implicitly includes an affirmative defense. But there is no case that supports the affirmative defense that the County asserts—a defense that would excuse unequal treatment if the government can show a rational basis. And the Court of Appeals did not take sides on the conflict that does exist—whether a strict-scrutiny defense should be applied.

At the outset, it bears emphasis that, unlike RLUIPA's substantial burden provision, 42 U.S.C. § 2000cc(a), the equal terms provision, § 2000cc(b), contains no affirmative defense. The most straightforward reading of the statute is that this omission was intentional, and that Congress intended equal terms violations to carry strict liability consequences. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (alteration in original) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (per curiam))).

Nonetheless, the Eleventh Circuit in *Midrash* held that the equal terms provision contains an implicit strict scrutiny affirmative defense—that the government could justify unequal treatment if its decision "'advance[s] interests of the highest order' and is narrowly tailored in pursuit of those interests." 366 F.3d at 1235 (alterations in original) (citations omitted). Other courts disagree. *See Lighthouse*, 510 F.3d at 269 ("[W]e decline to follow the Eleventh Circuit's reasoning. We hold instead that, if a land-use regulation treats religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions that are no less harmful to the governmental objectives in enacting the regulation, that regulation—without more—fails under RLUIPA."); *River of Life Kingdom Ministries*, 611 F.3d at 370-31.

The Tenth Circuit in this case did not take sides in this dispute. As the Court noted, "the County has not argued that it should enjoy a strict scrutiny defense to the equal terms provision, and thus the argument is waived." App. 15.

The County argued instead for a rational-basis defense, which the Court of Appeals properly rejected. "*If the equal terms provision includes an affirmative defense* based on Free Exercise Clause jurisprudence," the Court explained, "a rational basis defense is warranted only for neutral, generally applicable laws," not for what occurred here—"singl[ing] out the Church for adverse treatment" in a "non-neutral[ ]" fashion. App. 14 (emphasis added).

The County masts a single district court opinion in support of its theory that the equal terms

provision contains an implicit rational basis defense—*Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 615 F. Supp. 2d 980 (D. Ariz. 2009). There the court held that "rational basis review must be applied where the government shows that the unequal treatment identified by a religious organization actually stems from a neutral and generally applicable principle." *Id.* at 1000. That statement is entirely consistent with the Tenth Circuit's statement in this case—that "a rational basis defense is warranted only for neutral, generally applicable laws," App. 14, not for non-neutral decisions singling out religious organizations. Indeed, citing to *Midrash*, the *Centro Familiar* court noted that "strict scrutiny applies to laws that violate the equal terms provision." 615 F. Supp. 2d at 1000. [10]

3. The Asserted Split over the Unreasonable Limitations Provision

Finally, the County posits a split regarding RLUIPA's unreasonable limitations provision between the Tenth Circuit's decision in this case and the Seventh Circuit's decision in *Vision Church v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006). There is, however, no split.

In *Vision Church*, the RLUIPA plaintiff challenged a special use application process on the ground that the zoning board's "unbridled" discretion

---

[10] As the County notes, Pet. 18, *Centro Familiar* is currently pending before the Ninth Circuit. As of the filing of this Opposition, the Ninth Circuit has yet to issue an opinion in the case.

rendered the special use process *per se* unreasonable under RLUIPA. 468 F.3d at 990. The Court of Appeals rejected the plaintiff's premise. *Id.* at 990-91. ("The Board's discretion is narrowly circumscribed by the Village's Zoning Regulations, which set forth various factors to be considered by the Board in addressing an application for a special use permit."). It went on to suggest, in *dictum*, that "[e]ven if the Zoning Regulations were to grant the Board undue discretion, this does not demonstrate [a] violation of RLUIPA § 2(b)(3)(B). The requirement that churches obtain a special use permit is neutral on its face and is justified by legitimate, non-discriminatory municipal planning goals." *Id.* at 991.

The Church has no quarrel with this *dictum*, and the Tenth Circuit's opinion in this case contains nothing that contradicts it. The Church's position on appeal was not that the requirement of a special use permit is *per se* unreasonable. On the contrary, and as the Tenth Circuit clearly noted in its opinion, the Church's unreasonable limitations claim was based on (1) evidence that the County's Comprehensive Plan has, as a practical matter, left very few sites for church development; and (2) the unique burdens the County placed on the Church during the application process. App. 16 (noting testimony that the Plan "has effectively left few sites for church construction"); *id.* (noting County commissioner's statement that "'there will never be another mega church . . . in Boulder County.'"); App. 17 (noting that "[t]he jury also learned of disparate treatment by the County land use staff between the Planning Commission and County Commission hearings").

C. The Tenth Circuit's Decision Was Correct and Will Not Open the Floodgates.

The standard for issuing judgment as a matter of law is among the most demanding in the federal courts. "Under Rule 50, a court should render judgment as a matter of law when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 149 (2000) (citation omitted). "[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* at 150.

As the Court of Appeals noted, the record in this case contained voluminous evidence establishing not only that the County had treated the Church less favorably than a similarly situated secular institution, but also that the County had singled out the Church for various forms of "adverse treatment," App. 14, by, *inter alia*, applying a never-before-used protocol for determining land use intensity, App. 7, and assessing the environmental impact of the Church's application as if it were a proposal for an entirely new structure, rather than an expansion of an existing structure, App. 14. This provided more than sufficient evidence for a reasonable jury to conclude that the County had used its land use code unfairly and consistently with the objective articulated by a former County Commissioner—that "'there will never be another mega church . . . in Boulder County.'" App. 16.

As it did at trial, the County paints a far more benign picture of its handling of the Church's application, arguing that all it did was to "correctly appl[y] its special use regulations." Pet. 16. However, Congress enacted RLUIPA precisely because it worried that local governments often invoke "vague and universally applicable reasons," such as that a proposal is "not consistent with the city's land use plan," as a justification to deny equal treatment to religious organizations. 146 Cong. Rec. S7774–75 (daily ed. July 27, 2000) (quotation marks omitted). The record in this case illustrates the wisdom of the remedy Congress chose for this problem when it enacted RLUIPA.

Finally, contrary to the County's contention, the decision in this case does not mean that a local government must "ignore its regulations." Pet. 14, 16. The decision requires simply that local governments apply their regulations on an equal basis to religious and nonreligious organizations alike. If they apply their standards equally, they need not fear litigation. Indeed, if the reported caselaw provides an accurate indication, as-applied equal terms challenges are quite rare. This likely owes to the fact that finding a similarly situated but more favorably treated secular comparator is no easy task for a would-be RLUIPA plaintiff. This case represents a rare circumstance in which a church was able to locate a secular institution located in the same jurisdiction that had obtained approval from the same zoning authority to build a structure of substantially the same size for the same uses on land designated for the same purposes (in fact, on land that was more rural and environmentally sensitive). Even then, it took 12 days of trial proceedings for the

Church to prove that the Dawson School was a "similarly situated" comparator. Thus, to the extent that the County's Petition is meant to imply that the Tenth Circuit's opinion will open up some new floodgate of RLUIPA litigation and undermine the ability of municipalities in the Rocky Mountains and elsewhere to control urban sprawl, the suggestion greatly exaggerates the impact of the decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. THOMAS MACDONALD
OTTEN, JOHNSON, ROBINSON, NEFF & RAGONETTI
950 Seventeenth Street
Denver, Colorado
ERIC RASSBACH
LORI WINDHAM
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K. Street, N.W.
Washington, DC 20036

KEVIN T. BAINE
Counsel of Record
EVA PETKO ESBER
CURTIS J. MAHONEY
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5010
kbaine@wc.com

Counsel for Respondent Rocky Mountain Christian Church

REPLY BRIEF

No. 10-521

Supreme Court, U.S.
FILED
NOV 30 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BOARD OF COUNTY COMMISSIONERS
OF BOULDER COUNTY,

Petitioner,

v.

ROCKY MOUNTAIN CHRISTIAN CHURCH
and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

DAVID HUGHES, Deputy County Attorney
Counsel of Record
BOULDER COUNTY ATTORNEY
P.O. Box 471
Boulder, CO 80306
(303) 441-3190
dhughes@bouldercounty.org

JEAN E. DUBOFSKY
THE DUBOFSKY LAW FIRM, P.C.
1000 Rose Hill Dr.
Boulder, CO 80302
(303) 447-3510

JOHN R. BAUER
ROBINSON & COLE, LLP
One Boston Place
Boston, MA 02108
(617) 557-5900

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY TO BRIEF IN OPPOSITION 1

1. The County properly preserved the issue raised in the Petition: the meaning of RLUIPA's Equal Terms and Unreasonable Limitations provisions 2

2. The County did not propose or accept the Equal Terms or Unreasonable Limitations construction adopted by the Tenth Circuit 5

3. The split in the circuits goes directly to how the Equal Terms provision should be interpreted 7

4. This case squarely presents a substantial and important issue that should be reviewed by this Court 11

CONCLUSION 12

APPENDIX

Appellant's Opening Brief (excerpts) in case no. 09-1188, filed in the United States Court of Appeals for the Tenth Circuit on Aug. 31, 2009 ..... App. 1

Appellant's Reply Brief (excerpts) in case no. 09-1188, filed in the United States Court of Appeals for the Tenth Circuit on Dec. 14, 2009 ..... App. 9

TABLE OF AUTHORITIES

Page

CASES

Adhi Parasakthi Charitable, Medical, Educational, and Cultural Soc. v. Twnsp. of West Pikeland, ___ F. Supp. 2d ___, 2010 WL 2635979 (E.D. Pa. June 25, 2010) 8

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 6

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 7

Centro Familiar Christiano Buenas Neuvas v. City of Yuma, 615 F. Supp. 2d 980 (D. Ariz. 2009) 9, 10

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 7

Griffin Industries, Inc. v. Irvin, 496 F.3d 1189 (11th Cir. 2007) 8

Konikov v. Orange County, 410 F.3d 1317 (11th Cir. 2005) 9

Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007) 8

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004) 9

Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295 (11th Cir. 2006) 9

TABLE OF AUTHORITIES – Continued

Page

River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367 (7th Cir. 2010).....8, 10

Third Church of Christ, Scientist v. City of New York, 617 F. Supp. 2d 201 (S.D.N.Y. 2008).....8

Village of Willowbrook v. Olech, 528 U.S. 562 (2000).....10

REPLY TO BRIEF IN OPPOSITION

The Church's Brief in Opposition attempts to paint this case as one about religious discrimination when just the opposite is true. In every way it could, the Church asked the jury whether Boulder County discriminated against religion or violated the Constitution. Specifically, the Church asked the jury: (1) did Boulder County discriminate against the Church under RLUIPA; (2) did the County impose a substantial burden on the Church's religion under the United States or Colorado Constitutions; (3) did the County unconstitutionally discriminate based on religion; (4) did the County unconstitutionally discriminate based on viewpoint; and (5) did the County unconstitutionally discriminate based on association? Court of Appeals Appellant's Appendix ("A") 3108-11. In each case, the jury answered "no." *Id.*

The Church did not challenge these verdicts on appeal. As a result, Boulder County's Petition for Certiorari cannot be about a discriminatory land use decision. None of the judicially recognized methods of proving discrimination were present: the regulations were facially neutral and generally applicable; no governmental pattern of approving one class of applicant over another was established; no fact finder determined that a governmental decision was motivated by anti-religious bias; and no court made a legal determination that the government made an irrational decision. Therefore, the evidence the Church relied on at trial in an attempt to prove religious discrimination or bias, which is cited throughout the

Brief in Opposition, is irrelevant. The issue on appeal is not a fact-bound finding of religious discrimination, but rather whether RLUIPA's Equal Terms and Unreasonable Limitations provisions should reach beyond discrimination and create standards that establish a new and unprecedented level of governmental deference to religious uses.

The Church largely ignores the central issue of whether RLUIPA should be construed to expand the scope of legal protections granted to religious exercise. Instead, it focuses on technical issues that, as shown *infra*, fail to provide a reason to deny Boulder County's Petition.

1. The County properly preserved the issue raised in the Petition: the meaning of RLUIPA's Equal Terms and Unreasonable Limitations provisions.

The arguments articulated in the Petition are the same as those Boulder County presented to the Tenth Circuit. The Petition asks this Court to determine the appropriate interpretation of the Equal Terms and Unreasonable Limitations provisions of RLUIPA. If this Court grants the Petition, RLUIPA's constitutionality is at issue only if this Court determines that RLUIPA must be interpreted to exceed the scope of the Free Exercise Clause. Boulder County argues in its Petition, as it did below, that those provisions of RLUIPA should be interpreted consistently with the Free Exercise Clause to avoid constitutional infirmity.

With respect to the Equal Terms provision, Boulder County's opening brief in the Tenth Circuit stated: "Because Congress did not intend to expand free exercise rights by enacting this section, the Court should read this provision to enforce existing Free Exercise doctrine. Further, courts must avoid reading statutes in a manner that renders the provision unconstitutional." Appellant's Opening Br., Appendix to this Reply ("R. App.") at 3. In addition, Boulder County argued that "[a] more expansive reading of the equal terms provision would render it unconstitutional. . . ." *Id.*

Boulder County further argued to the Tenth Circuit that "since the equal terms provision codifies free exercise principles, rational basis review must be applied. . . ." *Id.* at 6 n.5; *see also id.* at 6 ("Thus, the rational basis test applies to the equal terms claim. . . ."). Two pages of its opening brief were devoted to the argument that "[t]he County's decision was rationally related to a legitimate governmental interest." *Id.* at 5-6. Boulder County's Reply Brief was more detailed, including a four-page argument entitled, "The Court must construe the equal terms provision as a codification of free exercise principles" and a seven-page argument applying this legal principle to the facts. Appellant's Reply Br., R. App. at 11-20.

Similarly, with respect to the unreasonable limitations provision, Boulder County stated that "Congress intended the 'unreasonable limitations' provision to mirror the settled doctrine that local

governments may not zone a category of constitutionally protected conduct out of a jurisdiction." Appellant's Opening Br., R. App. at 7. Boulder County further argued that "the unreasonable limitations provision requires that courts focus their attention on the land use regulation being imposed or implemented and not the *manner* in which the land use regulation is imposed or implemented." *Id.* at n.6.

The Tenth Circuit was wrong when, as a reason for refusing to address the constitutionality of its interpretation of the Equal Terms and Unreasonable Limitations provisions, it wrote that Boulder County waived its constitutional challenges because "mention of those arguments in its opening brief, Aplt. Br. at 38 n.7, is too cursory and undeveloped for review." Petition App. ("App.") 18. The portion of the opening brief cited by the circuit court stated: "if this Court were to conclude that either the equal terms or unreasonable limitations provision expands constitutional guarantees, the same arguments raised against the substantial burden provision would apply to those provisions as well." Appellant's Br. at 38 n.7. The Tenth Circuit found that Boulder County *had* preserved its constitutional challenges to the substantial burden provision. App. 18. In fact, Boulder County devoted eight pages of its brief to its argument related to the scope of Congress' enforcement power under Section 5 of the Fourteenth Amendment, Appellant's Br. at 38-44, and over three pages to

improper accommodation under the Establishment Clause, *id.* at 27-30.[1]

Thus, the record below demonstrates that the proper construction of the Equal Terms and Unreasonable Limitations provision of RLUIPA was litigated below and explicitly argued on appeal.

2. The County did not propose or accept the Equal Terms or Unreasonable Limitations construction adopted by the Tenth Circuit.

In deciding Boulder County's appeal under Fed. R. Civ. P. 50(a), the Tenth Circuit construed the Equal Terms and Unreasonable Limitations provisions *de novo*, but ultimately adopted as the controlling law the district court's jury instructions. App. 11, 15. The Church claims in its Opposition Brief that Boulder County conceded that the Tenth Circuit's interpretation of the law was correct by allegedly proposing jury instructions similar to those of the district court. The Church's argument has three major flaws. First, the district court instructions differed substantially from those proposed by Boulder County.[2] Second, Boulder

---

[1] Boulder County also raised the issue of the as-applied constitutionality of the Equal Terms and Unreasonable Limitations provisions of RLUIPA at the district court level in its renewed Fed. R. Civ. P. 50(a) motion. A. 3145-55.

[2] Boulder County disputes the assertions in the Opposition Brief that the district court adopted a jury instruction it "requested" or that its proposed Equal Terms instruction was "virtually indistinguishable" from that adopted by the district

(Continued on following page)

County and the Church presented rational basis review (to the extent that it was applicable) as an issue for the court, not the jury.[3] Therefore, application of the rational basis test would not have appeared in the Equal Terms jury instructions. Third, the proposed instructions, final instructions, and the objections to those instructions are irrelevant to a Fed. R. Civ. P. 50(a) analysis regardless of what they stated.

It is well established that, when a party appeals a trial court's denial of a motion for judgment as a matter of law ("JMOL"), the court must review the sufficiency of the evidence under the controlling law, not the law read to the jury. This standard applies regardless of whether the appellant objected to or appealed the instructions. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 n.26 (1985). Even if the same legal issue is raised by the JMOL motion and by the jury instructions, failure

---

court. Over Boulder County's numerous objections, A. 5176-79, 5185-88, 5211-12, the district court included the phrase "processing, determining, and deciding" in the Equal Terms instructions. A. 3084-85. In addition, the district court refused to define "similarly situated," a critical issue to the Equal Terms appeal. *See* A. 2702. The Unreasonable Limitations instruction was substantially different than that proposed by Boulder County. *Compare* A. 2681-82 to A. 3090-91. As Boulder County explained at Oral Argument, it did not appeal the jury instructions because it believed they were correct, but rather because the issues should not have gone to the jury in the first place.

[3] *See* A. 2673, 2815, 2994, 3279. The district court also acknowledged that application of the rational basis test was an issue for the court and not the jury. *See* A. 4986:4-11.

to object to the jury instruction will not negate the appeal. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 119-20 (1988) (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., White & Scalia, JJ.); *see also Boyle v. United Technologies Corp.*, 487 U.S. 500, 513-14 (1988) (citing *Praprotnik*, 485 U.S. at 118-20). Therefore, even assuming Boulder County failed to adequately propose or object to the jury instructions, it did not waive its ability to argue that the Tenth Circuit misinterpreted RLUIPA.

3. The split in the circuits goes directly to how the Equal Terms provision should be interpreted.

The Church concedes that courts of appeals have adopted different approaches to the Equal Terms provision, but argues that those differences only arise in the context of facial challenges rather than the government's application of an otherwise valid regulation. Regardless of the specific factual allegations behind an Equal Terms claim, the central issue is whether the provision codifies Free Exercise protections. Specifically, local governments need to know what "similarly situated" means and what level of scrutiny, if any, their decisions and regulations will be subjected to if they are challenged.

The Tenth Circuit decided that a "similarly situated" determination should be included in an analysis of an Equal Terms claim, but refused to define "similarly situated." In contrast, the Third and

the Seventh Circuits found it necessary to further define "similarly situated" to provide guidance to local governments and to address Establishment Clause concerns that arise in the absence of a specific definition. *See Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264-66 (3d Cir. 2007) and *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 370-71 (7th Cir. 2010); *see also Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1203 (11th Cir. 2007) ("Too broad a definition of 'similarly situated' could subject nearly all state regulatory decisions to constitutional review in federal court and deny state regulators the critical discretion they need to effectively perform their duties.").

Neither the Third nor the Seventh Circuit limited their holdings to facial challenges or suggested that "similarly situated" should be defined in some circumstances but not others. Indeed, courts have applied the Third Circuit test in the context of as-applied claims. *See, e.g. Third Church of Christ, Scientist v. City of New York*, 617 F. Supp. 2d 201, 213-15 (S.D.N.Y. 2008) and *Adhi Parasakthi Charitable, Medical, Educational, and Cultural Soc. v. Twnsp. of West Pikeland*, ___ F. Supp. 2d ___, 2010 WL 2635979, *17 (E.D. Pa. June 25, 2010). The applicable definitions apply equally well in the as-applied context. For example, in this case, the question would be whether the Church's proposed expansion and the Dawson School were similarly situated

"as to the regulatory purpose" or "as to the accepted zoning criteria."

For as-applied challenges, the Eleventh Circuit found that a neutral statute's application may violate the Equal Terms provision if it differentially treats similarly situated religious and nonreligious assemblies. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1311 (11th Cir. 2006). This as-applied test does not define "similarly situated" or incorporate either strict scrutiny or rational basis review. *See, e.g., id.* and *Konikov v. Orange County*, 410 F.3d 1317, 1327-29 (11th Cir. 2005). The Eleventh Circuit attempted to reconcile its facial Equal Terms test, which incorporates a strict scrutiny analysis, with Supreme Court precedent, *see Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231-32 (11th Cir. 2004); but it has not provided a similar justification for its as-applied test, nor has it explained why it is appropriate for Equal Terms formulations to change based upon the underlying facts of the claim.

Beyond how to define "similarly situated" is the question of the rational basis test. If, as asserted by the Church, the Third and Seventh Circuits will need to formulate new tests to address as-applied equal terms, then the issue of application of the rational basis test could arise as it did in *Centro Familiar Christiano Buenas Neuvas v. City of Yuma*, 615 F. Supp. 2d 980 (D. Ariz. 2009). The district court in that case rejected a plain text reading of the Equal Terms provision similar to that used by the Tenth Circuit, stating that such a "sweeping interpretation"

of the Equal Terms provision "would far exceed religious organizations' rights under the Free Exercise Clause. . . ." *Centro Familiar*, 615 F. Supp. 2d at 994 n.3. To avoid these constitutional pitfalls, the district court found that governments could defeat an Equal Terms claim by "showing that any disparate treatment of a religious and a nonreligious assembly or institution stems from a neutral and generally applicable principle." *Id.* at 995. This is done through the application of the rational basis test. *Id.* at 1000.

The differing judicial opinions on how to interpret the Equal Terms provision show that, in the absence of Supreme Court intervention, courts will continue to struggle with how to apply the provision and local governments will be left with little guidance. The Church makes light of the issue by saying that if local governments "apply their standards equally, they need not fear litigation." Opp'n Br. at 21. However, as recently acknowledged by the Seventh Circuit, "'equality' is a complex concept." *River of Life*, 611 F.3d at 371; *see also Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (Breyer, J., concurring) ("Zoning decisions . . . will often, perhaps almost always, treat one landowner differently than another. . . ."). The varied analysis of the Equal Terms provision among the circuits proves that point.[4]

---

[4] Boulder County is relying on the arguments it raised in the Petition with respect to the Tenth Circuit's erroneous interpretation of the Unreasonable Limitations provision and the Tenth Circuit's split with the Seventh Circuit on that issue.

4. This case squarely presents a substantial and important issue that should be reviewed by this Court.

The tortured path this case has taken is indicative of what happens when there are no clear guidelines from this Court about how to apply the land use provisions of RLUIPA. As the three amicus briefs in support of this Petition demonstrate, the proper application of RLUIPA has reached a critical turning point for local governments and professional planners across the country. If broad, open-ended standards like those adopted by the Tenth Circuit remain in place, cities and counties will have little choice but to forfeit a portion of their long-standing authority to plan for the development of their communities, and religious institutions will be, as a practical matter, all but immune to commonplace zoning laws.

CONCLUSION

For the reasons stated in the Petition and this Reply, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

DAVID HUGHES, Deputy County Attorney
Counsel of Record
BOULDER COUNTY ATTORNEY
P.O. Box 471
Boulder, CO 80306
(303) 441-3190
dhughes@bouldercounty.org

JEAN E. DUBOFSKY
THE DUBOFSKY LAW FIRM, P.C.
1000 Rose Hill Dr.
Boulder, CO 80302
(303) 447-3510

JOHN R. BAUER
ROBINSON & COLE, LLP
One Boston Place
Boston, MA 02108
(617) 557-5900

Attorneys for Petitioner

App. 1

Case No. 09-1188

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROCKY MOUNTAIN CHRISTIAN CHURCH,	)
Plaintiff-Appellee,	)
and	)
UNITED STATES OF AMERICA,	)
Intervenor Plaintiff-Appellee	)
v.	)
BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY	)
Defendant-Appellant.	)

On Appeal from the United States District Court
for the District of Colorado
The Honorable Robert E. Blackburn, District Judge
Civil Action No. 06-cv-00554-REB-BNB

APPELLANT'S OPENING BRIEF

ORAL ARGUMENT REQUESTED

David Hughes, Esq.
BOULDER COUNTY
ATTORNEY
P.O. Box 471
Boulder, CO 80306
(303) 441-3190

Jean E. Dubofsky, Esq.
THE DUBOFSKY
LAW FIRM, P.C.
1000 Rose Hill Dr.
Boulder CO 80302
(303) 447-3510

H. Bissell Carey, III, Esq.
John R. Bauer, Esq.
Dwight H. Merriam, Esq.
ROBINSON & COLE, LLP
One Boston Place
Boston, MA 02108-4404
(617) 557-5900

* * *

significant and negative impact on neighboring non-beneficiaries. (App. 4090:2-17; 4784:1-6; 4751-52; 4765-67; 4787:14-23; 4877-78.)

D. The evidence was insufficient for a reasonable jury to find a violation of the equal terms provision.

If the Court construes the equal terms provision of RLUIPA to enforce the guarantees of the Free Exercise clause, it should enter judgment as a matter of law in favor of the County because the Church failed to demonstrate at trial a sufficient evidentiary basis for a jury to find that the County violated the equal terms provision.

The equal terms provision "enforce[s] the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable."

146 CONG. REC. S7774-01, *S7776 (2000). *See also Grace United*, 451 F.3d at 649; *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231-32 (11th Cir. 2004). Congress created the provision to provide an additional recourse for religious landowners subjected to unconstitutional discrimination and egregious constitutional violations by local governments. 146 CONG. REC. S7774-01, *S7775-76 (*Joint Statement*).

Because Congress did not intend to expand free exercise rights by enacting this section, the Court should read the provision to enforce existing Free Exercise doctrine. Further, courts must avoid reading statutes in a manner that renders the provision unconstitutional. *Boumediene v. Bush*, 128 S. Ct. 2229, 2296 (2008); *see also Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 514 (2007). A more expansive reading of the equal terms provision would render it unconstitutional under Section 5 of the Fourteenth Amendment. *See Boerne*, 521 U.S. at 519 ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.").

Accordingly, to prove a violation of the equal terms provision, the Church had to prove that it was treated less favorably than a similarly situated nonreligious assembly or institution in a way that amounts to a constitutional violation. "A plaintiff bringing an as-applied Equal Terms challenge must present evidence that a *similarly situated* nonreligious comparator received differential treatment under the challenged regulation." *Primera Iglesia*

Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295, 1311 (11th Cir. 2006).

1. The evidence was insufficient to prove that the Church and the Dawson School were similarly situated.

"If a plaintiff offers no similarly situated comparator, then there can be no cognizable evidence of less than equal treatment, and the plaintiff has failed to meet its initial burden of proof." *Primera Iglesia,* 450 F.3rd at 1311. The comparator proposed by the Church, namely the Dawson School, was not sufficiently similarly situated to justify a finding of unequal treatment based on differing application outcomes. As no other comparator was offered, the evidence was insufficient to support a finding of a violation of the equal terms provision.

The evidence at trial demonstrated material differences between the Church's 2004 application and the 1995 Dawson School applications. Compare App. 6460 (the Church's 2004 application requested an additional 132,200 square feet and the addition of 500 additional parking spaces) with App. 4154-55; 4708:16-19; 5612-13 (Dawson School's 1995 application proposed to add 63,000 square feet and relatively few additional parking spaces). Compare also App. 4154-55; 4708:9-15 (1995 Dawson School application proposed multiple small buildings of which the largest was the proposed 30,000 square foot gymnasium) with App. 6460 (2004 the Church application

proposed one massive complex totaling approximately 240,800 square feet); *see also* App. 4710-11 (the traffic generated by the Church, if it were permitted to build everything that it proposed in its 2004 application, would be ten times greater than traffic generated by the Dawson School during the week and even more than that on Sundays); App. 4709:4-9 (the visual impact of the Church's proposed development would be significantly greater than the visual impact of the expansion of the Dawson School approved in 1996). Accordingly, no reasonable jury could conclude that the 1995 Dawson School application and the Church's 2004 application were similarly situated.

2. The County's decision was rationally related to a legitimate governmental interest.

The County's partial denial of the Church's application was rationally related to a legitimate government purpose. As explained above, the equal terms provision must be construed as embodying Free Exercise principles. Accordingly, a neutral and generally applicable law, or its application, violates the equal terms provision only if the law or its application is not rationally related to a legitimate government purpose. "[A] law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a

constitutional challenge." *Grace United,* 451 F.3d at 649. *See also Smith,* 494 U.S. at 879.[5]

The evidence at trial demonstrated that the Code and the County's application of the Code to the Church were neutral and generally applicable. (App. 3109-111) (jury found that County did not discriminate against the Church). Accordingly, like the Cheyenne zoning ordinance at issue in *Grace United,* the Code "constitutes a neutral policy of general applicability." *Grace United,* 451 F.3d at 655. Thus, the rational basis test applies to the equal terms claim, and there can be no dispute that the County's partial denial of the Church's application was rationally related to the legitimate government purposes advanced by the Code. *See Crider v. Bd. of County Comm'rs of Boulder,* 246 F.3d 1285, 1289 (10th Cir. 2001) (challenged zoning ordinance was rationally related to the exercise of the state's traditional police power).

---

[5] "Since the equal terms provision codifies free exercise principles, rational basis review must be applied where the government shows that the unequal treatment identified by a religious organization actually stems from a neutral and generally applicable principle." *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma,* 615 F. Supp. 2d 980, 1000 (D. Ariz. 2009).

E. The evidence at trial was insufficient for a reasonable jury to find a violation of the unreasonable limitations provision.

1. Standard for proving unreasonable limitations.

Congress intended the "unreasonable limitations" provision to mirror the settled doctrine that local governments may not zone a category of constitutionally protected conduct out of the jurisdiction. "[G]overnment may not unreasonably exclude religious assemblies from a jurisdiction, or unreasonably limit them within the jurisdiction. This provision enforces the rule that First Amendment uses cannot be excluded from a municipality." H.R. Rep. 106-219 at 29 (1999). This provision provides additional recourse for religious landowners that are subjected to unconstitutional discrimination and egregious constitutional violations by local governments. 146 CONG. REC. at *S7775-76. Accordingly, to prevail on its unreasonable limitations claim, the Church had to prove that the Code excluded or unreasonably limited opportunities for religious assemblies, institutions and structures within Boulder County.[6] *See Vision*

[6] On its face, the unreasonable limitations provision requires that courts focus their attention on the land use regulation being imposed or implemented and not the *manner* in which the land use regulation is imposed or implemented. *Contrast* 42 U.S.C. § 2000cc(b)(3) ("No government shall impose or implement a land use regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction") with 42

(Continued on following page)

Church v. Village of Long Grove, 468 F.3d 975, 991 (7th Cir. 2006).

2. There was no evidence at trial of any limitations on opportunities for churches in Boulder County.

The Church presented no such evidence and no reasonable jury could find that the Code unreasonably limits opportunities for religious assemblies, institutions and structures within Boulder County. The County has approved all of the approximately 45 Special Use applications submitted by churches since 1994. (App. 4099:8-21.) Even the Church's expert, Ms. Koopmann, testified that she was not aware of any Special Use application by a church that was not approved by the County. (App. 4217:17-19; 4223:1922.) Thus, there was no evidence at trial that opportunities for religious assemblies, institutions, and structures were unreasonably limited within Boulder County. Accordingly, this Court should enter judgment as a matter of law in favor of the County on the unreasonable limitations provision.

* * *

U.S.C. § 2000cc(a)(1) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden. . . .").

Case No. 09-1188

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROCKY MOUNTAIN CHRISTIAN CHURCH,

Plaintiff-Appellee,

and

UNITED STATES OF AMERICA,

Intervenor Plaintiff-Appellee

v.

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Colorado
The Honorable Robert E. Blackburn, District Judge
Civil Action No. 06-cv-00554-REB-BNB

APPELLANT'S REPLY BRIEF

David Hughes, Esq.
BOULDER COUNTY
ATTORNEY
P.O. Box 471
Boulder, CO 80306
(303) 441-3190

Jean E. Dubofsky, Esq.
THE DUBOFSKY
LAW FIRM, P.C.
1000 Rose Hill Dr.
Boulder CO 80302
(303) 447-3510

H. Bissell Carey, III, Esq.
John R. Bauer, Esq.
Dwight H. Merriam, Esq.
ROBINSON & COLE, LLP
One Boston Place
Boston, MA 02108-4404
(617) 557-5900

* * *

equal terms provision.[12] Applying a correct interpretation of the equal terms provision, the Court should enter judgment in favor of the County.

---

[12] The Church argues that purported differences in the "processing" of the Dawson School and Church applications are an additional basis for an equal terms violation, citing to various actions taken by County land use staff who were not final decisionmakers. However, under RLUIPA, entity liability cannot be premised on the actions of its employees under a respondeat superior theory. *See Monell v. Dept. of Social Servs.*, 436 U.S. 658, 691-95 (1978). *See also Greenberg v. Hill*, 2009 WL 890521 (S.D. Ohio March 31, 2009) (applying *Monell* to RLUIPA); *Litman v. Santa Clara County*, 2008 WL 3876186 (N.D. Cal. August 18, 2008) (same).

A. The Court must construe the equal terms provision as a codification of free exercise principles.

Because the County appeals the denial of its Fed. R. Civ. P. 50(a) motion, the Court must consider *de novo* whether the evidence at trial was sufficient to find a violation of the equal terms provision. *Keylon v. City of Albuquerque*, 535 F.3d 1210, 1214-15 (10th Cir. 2008). To do so, the Court must first construe the equal terms provision rather than accept the construction used by the district court. *Milligan-Hitt v. Bd. of Trustees of Sheridan County School Dist. No. 2*, 523 F.3d 1219, 1230 (10th Cir. 2008).

The equal terms provision prohibits a government from imposing or implementing a land use regulation that "treats a . . . religious assembly . . . on less than equal terms with a nonreligious assembly . . . ." 42 U.S.C. § 2000cc(b)(1). RLUIPA does not define "treats" or "less than equal terms." However, the Church, the U.S., and every circuit court that has examined the equal terms provision agree that it must be construed to codify free exercise principles, and specifically the principles in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *See* Br. at 21-22; U.S. Resp. at 7; *see also River of Life Kingdom Ministries v. Village of Hazel Crest*, 585 F.3d. 364, 372 (7th Cir. 2009); *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264 (3d. Cir. 2007); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004).

The "first step" in analyzing a free exercise claim is determining "which level of scrutiny to apply." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006). "Depending on the nature of the challenged law or government action, a free exercise claim can prompt either strict scrutiny or rational basis review." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004). "In addressing the constitutional protection for free exercise of religion, our cases establish . . . that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi Babalu*, 508 U.S. at 531; *see also Grace United*, 451 F.3d at 649 ("a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest . . . ") (citations omitted).

Whether a law or policy is "neutral" is determined by the object of the law. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Lukumi Babalu*, 508 U.S. at 533. "A law is neutral so long as its object is something other than the infringement or restriction of religious practices." *Grace United*, 451 F.3d at 649-50.

Underlying the general applicability requirement is "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi Babalu*, 508 U.S. at 543. "A rule

that is discriminatorily motivated and applied is not a neutral rule of general applicability." *Axson-Flynn*, 356 F.3d at 1294. Thus, where government does not impose burdens *only* on religiously motivated conduct, government's action complies with the generally applicable requirement. *See Grace United*, 451 F.3d at 653-55 (land use ordinance prohibiting large day care centers in low-density residential zones was generally applicable and denying a variance to operate a day care did not violate the Free Exercise Clause because there was no evidence that "the ordinance was passed due to religious animus," that the city "specifically targeted religious groups . . . in its enforcement," that the city devalued religious reasons for operating day care centers by judging them to be less important than secular reasons, or that the denial of the variance constituted more than "an incidental burden on religious conduct").

Because the equal terms provision codifies these free exercise principles, it may not be read to impose liability where government imposes or implements neutral and generally applicable laws or policies. *See, e.g., River of Life*, 585 F.3d at 372 ("We assume that Congress [in adopting the equal terms provision], consistent with the Free Exercise cases, did not intend to invalidate neutral laws of general applicability."). *See also Lighthouse Inst. For Evangelism Inc.*, 510 F.3d at 269 n. 14 (explaining that the court's interpretation of equal terms provision "put[s] the teeth in section 2(b)(1) that it needs to follow Free Exercise case law").

B. The evidence was insufficient to prove that the proposed Church expansion was so similar to the Dawson School project with respect to the Code and the Plan objectives that the County could have had no legitimate secular reasons for partially denying the Church's application.

The evidence at trial was not sufficient to conclude that the developments proposed in the Church's 2004 application and Dawson School's 1995 application were similar enough with respect to their effect on the objectives of the Code and the Plan such that the County had no "legitimate secular reasons" for partially denying the Church's application. *See River of Life*, 585 F.3d at 370-374 (zoning ordinance creating a commercial district that permitted commercial uses but excluded churches did not violate equal terms provision because the effect of churches and commercial uses on the village's "legitimate secular reasons" for creating the district "were sufficiently distinguishable to remove any suspicion of religious gerrymandering"); *Lighthouse Inst. for Evangelism Inc.*, 510 F.3d at 266 ("a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*") (emphasis in original). On the contrary, the evidence at trial demonstrated that the two proposed developments would have significantly different impacts on the County's land use goals, and thus the County had legitimate secular

reasons for partially denying the Church's application.

1. The Dawson School and Church applications were not similarly situated with respect to the goals of the Code and Plan.

The County had legitimate secular reasons for concluding that conditional approval of the Dawson School application would advance its land use preservation goals and that approval of the Church's application would conflict with those goals. Both decisions resulted from an unbiased and thorough application of the special use criteria, which were enacted to further the goals of the Plan. (App. 6831 ¶ 1-300; 4601:20-24.) Professional land use staff issued detailed reports applying these criteria to the proposals. (App. 5660-5678; 6786-6809; 6459-6475; 5604-5610.) The planning commission, a board of volunteer citizens, issued recommendations to the Commissioners based on its evaluation under the criteria. (App. 5678; 6809; 6475; 5613 ¶¶ 5,6.) Finally, for both dockets, the County issued Resolutions addressing the criteria at length and placing conditions on the portions of the application that the Board approved. (App. 5612-5619; 5706-5715.)

Even if similar in size, the Dawson School and Church applications were not similarly situated with respect to the objectives of the Plan. The Commissioners decided to partially deny the Church's application because the application did not comply with

three of the special use criteria. (*See* Br. at 10-12.) The two surviving Commissioners testified about why they believed a 240,000 square foot facility in the Niwot area would be contrary to the goal of preserving a buffer of agricultural and open space uses around the Niwot community. (App. 5066:18-5067:23; 5094:7-5095:6; 5101:7-5105:20; 5022; 5039.)

In contrast, ten years earlier, three different Commissioners concluded in a very different factual context that the Dawson School application advanced the Plan's goals. Immediately prior to the County's decision on that application, the Dawson School considered annexing its 700 acres into either Lafayette or Erie. (App. 4913:24-4915:20.) To avoid an annexation war that would have resulted in intense urban development in an agricultural area, the County facilitated a three-way intergovernmental agreement ("IGA"). (App. 4913:24-4914:17; 5841-5855.) The agreement preserved the rural setting because Dawson School remained in an unincorporated area with a 650-acre open space buffer around the site. (App. 4914:18-4917:6.) Although the IGA permitted Dawson School to submit a special use application to expand, the Commissioners believed that their approval reinforced the County's preservation goals because the school was a part of a larger land use preservation accomplished through the IGA. (*See* App. 5612-5619.) The IGA avoided an increase in density by ten times if either of the bordering cities had annexed the site. (App. 1147.)

Hence, the two applications were not similarly situated and the County had legitimate secular reasons for conditionally approving the Dawson School application in 1995 and partially denying the Church's application in 2006. Each decision was consistent with and advanced the goals of the Code and the Plan.

2. *The County did not infringe upon or restrict the Church's practices because of their religious motivation, target religion, or selectively burden only conduct motivated by religious belief.*

The Church's equal terms case is really an unsupportable argument that the Church's application satisfied the special use criteria and therefore, like the Dawson School application, should have been approved. However, unless religion factored impermissibly into the County's decision on the Church's application, i.e., if the County had no legitimate secular reasons for the two decisions, there is no basis for finding an equal terms violation.

The purpose of the equal terms provision is to enforce free exercise rights, not to create a federal zoning review board. "It is always possible for persons aggrieved by government action to allege, and almost always possible to produce evidence, that they were treated differently from others, with regard to everything from zoning to licensing . . . " *Jennings v. City of Stillwater,* 383 F.3d 1199, 1211 (10th Cir. 2004). Equal terms cases, however, should not go to a jury based

only upon a disagreement about the correct application of zoning laws. Otherwise, "[i]t would become the task of federal courts and juries . . . to inquire into the grounds for differential treatment and to decide whether those grounds were sufficiently reasonable . . . " *Id.* This would "constitute the federal courts as general-purpose second-guessers of the reasonableness of broad areas of state and local decisionmaking: a role that is both ill-suited to the federal courts and offensive to state and local autonomy in our federal system." *Id. See also* Amicus Br. of Am. Planning Ass'n at 2-3 (explaining RLUIPA's potential impact on the "balancing act" of planning and development).

The critical issue in determining whether the County violated the equal terms provision is not whether the Commissioners correctly decided the two special use applications. Rather, it is whether the County lacked legitimate secular reasons for partially denying the Church's application in 2006 after conditionally approving the Dawson School in 1995, thus warranting a conclusion that the County violated the principles of neutrality and general applicability. The County did not violate the equal terms provision, just as the County did not violate the Free Exercise Clause. On the contrary, County complied in all respects with the principles of neutrality and general applicability.

The Church does not dispute that the Code is neutral on its face. *Grace United*, 451 F.3d at 650; see also App. 5234:24-5235:15. Moreover, there was no evidence at trial that the object of the Code or the

County's implementation of the Code was "to infringe upon or to restrict practices *because of their religious motivation.*" *Lukumi Babalu*, 508 U.S. at 533 (emphasis added). The undisputed evidence at trial indicated the opposite, that the County's partial denial of the Church's application had nothing to do with religion. (App. 5578-5583; 5021:10-14; 5034:11-5035; 5027:5-22; 5062:16-5067:23; 5075:20-5077:2; 5093; 5097-5099:1; 5100:11-5106:15; 5110:5-5111:6.) Moreover, the jury found that the County did not deny the Church's application based on religion. (App. 3108-11.) Accordingly, the Code and the County's implementation of the Code complied with the principle of neutrality. *See River of Life,* 585 F.3d at 373 (holding that an ordinance excluding churches from a commercial district does not violate the principle of neutrality and stating, "a zoning ordinance that permits a non-religious assembly but excludes a religious assembly does not indicate its object was to target religious practice" because "[t]here are a number of legitimate secular reasons for permitting some assemblies while excluding others").

Moreover, the Code is generally applicable. *See Grace United,* 451 F.3d at 650-55 and App. 5234:23-25 (where the district court found the Code to be a "law of general application.") There was no evidence at trial that the Code was adopted due to religious animus or that the County specifically targeted religious groups in its enforcement of the Code. *See Grace United,* 451 F.3d at 653-54. To the contrary, prior to the partial denial of the Church's application, the

County had approved every special use application submitted by a church, including multiple applications submitted by the Church. (App. 4099; 5706-5707.) There was no evidence that the County devalued religious reasons over secular reasons for requesting special uses. *See Grace United,* 451 F.3d at 654-55. In fact, the County's special use criteria, the analysis by staff, and the Commissioners' review of those criteria addressed only the land use aspects of the proposals. (App. 6965; 6466-6475; 5710-5713.) Finally, as further discussed *infra* pp. 25-28, the County's denial of the Church's application imposed no more than an incidental burden on the Church's religious conduct because the Church could continue to conduct its religious services and programs, "but not upon such a grandiose scale as . . . it now wishes to construct." *Grace United,* 451 F.3d at 655.

In short, there was no evidence that the Code was "discriminatorily motivated and applied." *Axson-Flynn,* 356 F.3d at 1294. Accordingly, the Code and the County's application of the Code were governed by neutral and generally applicable principles, which the equal terms provision must be read to codify. The Court should conclude that the evidence at trial was insufficient to find that the County violated the equal terms provision.

* * *